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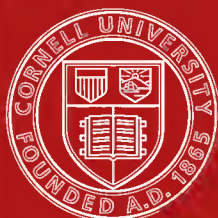
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MANUAL OF THE PRACTICE
OF THE
SUPREME COURT OF JUDICATURE.



JOHN INDERMAUR, Esq

SUPPLEMENT TO THE LAW GAZETTE

A
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IN THE
Queen's Bench and Chancery Divisions.

*INTENDED FOR THE USE OF STUDENTS AND
THE PROFESSION.*

BY
JOHN INDERMAUR,
SOLICITOR ;

FIRST PRIZEMAN, MICH. TERM, 1872 ; AUTHOR OF "PRINCIPLES OF THE COMMON LAW,"
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PREFACE TO THE SEVENTH EDITION.

THE Sixth Edition of this work being out of print, I have prepared this new edition, in which I trust everything will be found thoroughly brought down to date. I have nothing, substantially, to remark here beyond what is contained in my preface to the Sixth Edition, which I have left standing. As the last edition has gone out of print in three years, I think I may reasonably assume that the book has proved useful to practitioners as well as students. I have spared no pains in this direction, and, at the same time, students may observe that this edition only comprises ten more pages than the last one. I have to thank my friend, Mr. Charles Thwaites, for having again perused the proof sheets.

J. I.

22 CHANCERY LANE, W.C.

April 1897.

PREFACE TO THE SIXTH EDITION.

THE First Edition of this work was published in March 1878, and the last (Fifth) Edition in December 1888. Naturally, in the course of the five years that have elapsed since the publication of the last edition, there have been a very great number of changes effected in the practice of the Courts, and another edition of the work would have been produced earlier only it was thought advisable to wait for the new Rules, which have been so long forthcoming, and which only appeared about a month ago. I have lost no time since the appearance of these new Rules in preparing this edition, and I think it will be found that in the book are now embodied all the changes that have been made in the practice of the Courts since 1888, and those changes have been so numerous as to make the work one involving considerable labour and very close and careful attention. It is, however, with some degree of confidence that I express the hope that the book will be found thoroughly up to date, for I have been able not only to include in it, in their proper places, the various alterations effected by the Supreme Court Rules of November 1893, but also those effected by the Trustee Act, 1893, by the Rules issued under that Act, by the Supreme Court Funds

Rules of 1893, by various Acts of Parliament of the last Session, and of course by various antecedent Acts and Rules that have appeared since 1888. The present edition is but little larger than the last one, as I have, in introducing new matter, specially endeavoured to leave out old and obsolete details. I am afraid no book on Practice can be made very easy to students, but, at any rate, I think I may say that if they will carefully and thoroughly apply themselves to a perusal of this work they will acquire as good a knowledge of practice as is possible without an actual acquaintance with the details themselves; and those who have seen actual practice, and will also peruse this work carefully, ought to find themselves very proficient in a subject which, in every sense, is of great importance. Of course the work is very condensed, and in many places students will derive great assistance from reference to the Rules of Court themselves.

My original design in writing this work was to produce a book on the Practice of the Courts specially useful to students. That is still the main design in this edition, but I venture to submit that it may also be found of service to practitioners. The "Annual Practice" is a most valuable work, but it is, necessarily, so very complete and full that it is not a very handy book for reference on ordinary matters, though invaluable on account of its authorities and details; and I am somewhat confident that practitioners will find that this small work will give them, at any rate, the key-note to most points of practice, and then for elaboration, in cases in which it is necessary, they must, of course, fall back on the "Annual Practice."

In the hope that my book may be used by practitioners as well as students, I have in many places given details, also cases, and references to Rules of Court that I otherwise should not have done, and I have taken special pains with the Index, which I think may be fairly styled a full and comprehensive one. I venture, therefore, to submit this edition of my "Manual of Practice" as a book intended both for students and practitioners.

I have to thank my friend Mr. Charles Thwaites for having perused the proof sheets of the work, and for having made many valuable corrections and suggestions.

J. I.

22 CHANCERY LANE, W.C.

January 1894.



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NOTE.

WHILST this Edition has been going through the press, a Draft Rule has been published (see *London Gazette*, March 12, 1897), pursuant to the Rules Publication Act, 1893 (56 & 57 Vict. c. 66, sec. 1). It is not yet an actual Rule of Court, but will probably, either as it stands or in some modified shape, shortly become so. It is as follows:

ORDER XXX.

Rule 1 of Order XXX. of the Rules of the Supreme Court, November 1893, is hereby annulled, and the following Rule shall be substituted in lieu thereof:

1.—(a) Subject as hereinafter mentioned, in every action a summons for directions shall be taken out by the plaintiff, returnable in not less than four days.

(b) Such summons shall be taken out after appearance and before the plaintiff takes any fresh step in the action other than application for an injunction, or for a receiver, or for summary judgment under Order XIV.

(c) The summons shall be in the Form No. 3 (a) Appendix K, with such variations as circumstances may require, and shall be addressed to and served upon all such parties to the action as may be affected thereby.

(d) This Rule shall not apply to Admiralty actions within the meaning of sec. 34 of the Judicature Act, 1873, or to actions coming under the provisions of Order XVIII A.

(e) Where, under Order XVIII A., the defendant applies for a statement of claim, the Judge may deal with such application as if the plaintiff had been entitled to take out and had taken out a summons for directions.

If and when the foregoing becomes a Rule of Court, it will affect page 94 of this edition; and the alterations will be that a summons for directions *must* be taken out in all actions, whether in the Queen's Bench or in the Chancery Division, except as mentioned in paragraph (b) above, and except where the parties are proceeding to trial without pleadings (paragraph (d) above). As to this see pp. 70, 71.

J. I.

April, 1897.

SUPPLEMENT TO
INDERMAUR'S MANUAL OF PRACTICE
(SEVENTH EDITION)

THIS edition of my Practice was published in April 1897 before the present Order XXX. was finally passed, though I was able to give the draft of it. I do not think that Order XXX. necessitates a new edition of the book at present; in fact I think it best that students should read the Practice as it stands and compare and consider Order XXX. In course of time the procedure under Order XXX. will become more settled. In the meantime I feel a brief supplement may prove of much assistance.

To commence with I first give Order XXX. as it now stands:

ORDER XXX. OF THE RULES OF THE
SUPREME COURT

SUMMONS FOR DIRECTIONS

1. (a) Subject as hereinafter mentioned, in every action a summons for directions shall be taken out by the plaintiff returnable in not less than four days.

(b) Such summons shall be taken out after appearance and before the plaintiff takes any fresh step in the action other than application for an injunction, or for a receiver, or for summary judgment under Order XIV., or to enter judgment in default of defence under Order XXVII., Rule 2.

(c) The summons shall be in the Form No. 3A, Appendix K, with such variations as circumstances may require, and shall be addressed to and served upon all such parties to the action as may be affected thereby.

(d) This Rule shall not apply to Admiralty actions within the meaning of section thirty-four of the Judicature Act, 1873, or to actions coming under the provisions of Order XVIII., or to proceedings commenced by originating summons.

(e) Where, under Order XVIII., the defendant applies for a statement of claim, the Judge may deal with such application as if the plaintiff had been entitled to take out and had taken out a summons for directions.

2. Upon the hearing of the summons the Court or a Judge shall, so far as practicable, make such order as may be just with respect to all the interlocutory proceedings to be taken in the action before the trial, and as to the costs thereof, and more particularly with respect to the following matters:—Pleading, particulars, admissions, discovery, interrogatories, inspection of documents, inspection of real or personal property, commissions, examination of witnesses, place and mode of trial. Such order shall be in the Form No. 4A, Appendix K, with such variations as circumstances may require.

3. No affidavit shall be made or used on the hearing of the said summons except by special order of the Court or a Judge.

4. On the hearing of the summons any party to whom the summons is addressed shall, so far as practicable, apply for any order or directions as to any interlocutory matter or thing in the action which he may desire.

5. Any application subsequently to the original summons for any directions as to any interlocutory matter or thing by any party shall be made under the summons by two clear days' notice to the other party stating the grounds of the application.

6. Any application by any party which might have been made at the hearing of the original summons shall, if granted on any subsequent application, be granted at the costs of the party applying unless the Court or a Judge shall be of opinion that the application could not properly have been made at the hearing of the original summons.

7. On the hearing of the summons, the Court or a Judge may order that evidence of any particular fact, to be specified in the order, shall be given by statement on oath of information and belief, or by production of documents or entries in books, or by copies of documents or entries or otherwise as the Court or Judge may direct.

8. In any action to which Rule 1 of this Order applies, if the plaintiff does not within fourteen days from the entry of the defendant's appearance take out a summons for directions under this Order or for summary judgment under Order XIV., the defendant shall be at liberty to apply for an Order to dismiss the action and upon such application the Judge may either dismiss the action on such terms as may be just or may deal with such application in all respects as if it were a summons for directions under this Order.

I may summarise Order XXX. as follows : A summons for directions must be taken out by the plaintiff generally within fourteen days of appearance, otherwise the defendant may apply to dismiss for want of prosecution, and four days must elapse between the service and return of the summons. Such summons must be taken out after appearance, and before the plaintiff takes any fresh step in the action, subject to this, that without any such summons the plaintiff may apply (1) under Order XIV. ; (2) for an injunction ; (3) for a receiver ; and (4) he may sign judgment for want of a defence. Order XXX. does not, however, apply to Admiralty business, nor, like the other Judicature rules, does it apply to divorce business. The summons is, therefore, generally a compulsory summons, both in the Queen's Bench and in the Chancery Division.

The object of the summons is to enable the Master before whom it comes to at once give general directions as to the course of procedure in the action. He may determine whether or not there shall be pleadings, and he may limit the times for these pleadings irrespective of the Judicature Rules. Subject to any special directions, however, the prescribed times apply. He may at the hearing of the summons, instead of pleadings, order any particulars to be delivered, and points of claim and points of defence, and he may order discovery, and generally once

and for all give directions as to the conduct of the action. But though he may do all this it is not to be supposed that in every case he can at once do so. He may not see his way to it, the parties may not know what they want. In such cases the summons does not die but is still kept alive, and any party requiring anything at a later stage may give notice of an application under the original summons. Thus the idea is the saving of expense and the facilitating the progress of the action generally. This was plainly the idea of the judges in framing Order XXX., but they do not appear to have looked very far into matters, and the result is that all sorts of doubts have arisen, and though Order XXX. may be good in itself, it will need a good deal of remodelling to make it fit in nicely with the general practice. It is necessary to consider the practice as it stood prior to Order XXX. and then see the effect on it of Order XXX. It seems to me then that the best way of studying the subject at present, is to consider matters as they stood untouched by Order XXX., and then to study that Order with the greatest care.

In Part II., Chap. I., of my Practice, the proceedings in the Queen's Bench Division are detailed to appearance—as to the Chancery Procedure, see Part III., Chap. I. I have nothing to say as to the proceedings so far, as they are not altered by Order XXX. Then in Part II., Chap. II., we come to judgment in default of appearance, and applications under Order XIV., and as to the latter subject a few words are necessary. It must be observed that a summons under Order XIV. can be taken out without any summons for directions being issued. Were it not so, half the force and the effect of such a summons would have been taken away. If the plaintiff gets a judgment thus, then, of course, the object of the action is obtained. If the Master gives leave to defend, then he is empowered by Order XIV. to give all such directions as could be given under Order XXX. In other words, the order made may contain those directions which would ordinarily be given on a summons under Order XXX., and if not, a notice for directions may be issued or served. Anyhow, no independent summons for directions is taken out. If no directions are given the defendant must still, as heretofore, deliver his defence within eight days after the Order. This, then, seems fairly plain, and Order XXX. works in very well. If, however, the summons under Order XIV. is dismissed, then there is no power to give directions, but the plaintiff has his chance of signing judgment for want of a defence if he likes to wait for that, or he may at once issue a summons for directions. Anyhow, before the plaintiff can take any fresh step in the action, he must take out his summons for directions. In *Stringer's Practice* on the summons for directions (p. 111), the matter is plainly put as follows:—"The position of a defendant after dismissal of a summons under Order XIV., would appear to be the same as it was on the day prior to the issue of the summons. His time for defence would be suspended during the whole time the summons under Order XIV. was pending, and would recommence to run on the day after the dismissal of the summons. If, therefore, the action were for a liquidated demand only, and two days of the

time for defence expired before the summons under Order XIV. was issued, the defendant would have to deliver his defence within eight days of the dismissal of the summons. In default of his so doing, the plaintiff would be entitled to enter judgment in default of defence under Order XXVII., Rule 2, and Order XXX., Rule 1 (b)."

Putting aside Order XIV., let us now look at the position of a defendant who has appeared. Firstly, the writ may have been specially indorsed, and here if the defendant does not deliver a defence within ten days from his appearance the plaintiff may sign judgment for want of a defence under Order XXVII., Rule 2, and Order XXX., Rule 1 (b). Secondly, it may be a writ not specially indorsed, but yet for a liquidated amount. If the defendant demands a statement of claim he can rest quietly until the plaintiff takes out his summons for directions, but if he has not demanded a statement of claim, here again at the expiration of the ten days the same result would ensue, viz., that the plaintiff can sign judgment. Thirdly, it may be an action other than for a liquidated demand, and here the defendant need do nothing until the summons for directions has been taken out and an order made thereon. A defence then can be delivered before a summons for directions has been taken out; but it appears that a defendant is not entitled after a summons for directions has been issued to deliver a defence before the summons is heard. If the time for defence expires after the summons for directions has been taken out the plaintiff cannot take advantage of it—the issuing of the summons for directions has suspended his powers. At the hearing of the summons for directions the defendant can of course ask for any extension of time that may be necessary. All this seems very confused, and is matter of construction of Order XXX., whereas it should be all matter specially provided for by the rule itself.

It must be remembered that if a plaintiff does not take out a summons for directions within fourteen days of the appearance of the defendant, the defendant may apply to dismiss the action for want of prosecution, but on any such application, instead of the action being dismissed, directions may be given. This is then practically the defendant's mode of getting directions in the action where the plaintiff does not take the initiative.

Having now got some general idea of the effect of Order XXX. at the very commencement of the action, let us next proceed to notice its effect as the action progresses, and firstly it may be well to observe what is meant by the provision that it is not to apply to actions coming under the provisions of Order XVIII.A. As to this Order, I would refer my readers to my Practice (p. 70), where it will be seen that by adopting a certain procedure the plaintiff may proceed to trial without pleadings, but this is subject to the defendant's right to apply by summons asking that pleadings may be delivered. The result of Order XXX. has certainly been to make proceedings under Order XVIII.A. obsolete, for is it not better for the plaintiff to issue an ordinary writ, then apply for directions and endeavour to get an order dispensing with pleadings and have the action set down at once, rather than to proceed under Order XVIII.A., and have the defendant applying for pleadings,

an application which must resolve itself into the same thing as a summons for directions in an ordinary action? The procedure under Order XVIII. was never much used, and I think I may say is now practically obsolete.

In Part II., Ch. IV., of my Practice, various interlocutory proceedings in an action are dealt with, and it is necessary to consider how they are affected by the provisions of Order XXX. All such applications must be more or less necessary as heretofore, but there is a difference in procedure generally, which may be summed up by saying that instead of different summonses being taken out for every particular thing that is desired, they are all obtained under the summons for directions. I have pointed out that on the hearing of the summons the Master's powers take a wide scope. He may give general directions embracing all things. At the summons not only may he direct whether there shall or shall not be pleadings, and the times for them, but he may order discovery, may settle the place and mode of trial, and so forth. Of course he does not do all this spontaneously, but consults the parties and hears their arguments, and may if necessary receive evidence by affidavit, though no affidavit is to be used on the hearing of the summons except by special leave. In a great many cases all this cannot be done at once, but as the action progresses the parties discover their wants. In such cases it must be remembered that the summons for directions is still alive, and everything must be done under that, and no fresh summons taken out. The mode of proceeding is to issue and serve a notice of an application for further directions, which comes before the same Master who dealt with the original summons. This is a two clear days' notice, and it states in what respects further directions are required. It comes on to be heard just as the old summons for the particular thing required came on, and a fresh order is made. Here then is the great difference to be observed throughout in the chapter in my Practice on "Interlocutory Proceedings," and except in that respect the substance of the chapter is correct, subject to particular points with which I will now proceed to deal.

A summons for time to put in a pleading or take any other necessary step is dealt with in my Practice (p. 93), and it is pointed out that it may be served on the day previous to the return thereof. This is the same now when the defendant is applying to keep his time for defence alive before a summons for directions has been issued, but where the summons for directions has been issued we see a difference which surely was never thought of. Any extension of time in such a case must be obtained by a notice under Order XXX., and as all notices under it must be two clear days' notice, the result is that time cannot be obtained as expeditiously as heretofore.

Payment into Court is dealt with in my Practice (pp. 97-102), and that remains as heretofore, but Order XXX. raises a doubt as to the getting of the money out of Court before a summons for directions is issued. It must be remembered that the plaintiff cannot take a fresh step in the action after appearance without first taking out his summons for directions. But how about his taking the money out of

Court? Is not that a fresh step, and can it be done without a summons for directions being first taken out? The conclusion that appears at present to be arrived at is that if the plaintiff accepts the money paid in in satisfaction of his claim, as he terminates the action, he may take the money out of Court without applying for directions, but that it is otherwise if he desires to take it out without accepting it in satisfaction. The act of his taking the money out of Court is taking a fresh step in the action, which he has no right to do until after he has applied for directions. Here then we see an alteration produced by Order XXX. which, no doubt, was never thought of by the framers of it.

An action on contract may in certain cases be transferred to the County Court (see my Practice, p. 113), and this either by the plaintiff or the defendant. The defendant can no doubt apply by ordinary summons for such an order before any summons for directions has been taken out, but it is not so as regards the plaintiff. The application is clearly a "step in the action," and if the plaintiff wants a transfer to the County Court he must take out his summons for directions, and on its return ask the Master to so order. It will then be for the Master to make an order transferring the action to the County Court, or if he does not think fit to do so, to make all necessary directions for the continuance of the action in the High Court. This means some slight delay and further expense, though nothing worth speaking of. However, I do not think that what I am stating to be the position can hardly yet be considered settled practice. In fact I know that, at any rate in one of the District Registries, a different view has been taken, and Mr. Stringer, in his work to which I have already referred, says: "It is not impossible that it may be held inconvenient to include within the scope of Order XXX. the making of an order which is in no sense a 'direction,' but is in fact a final removal of the action out of the seisin of the High Court."

An order for the arrest of a defendant in the course of an action (see my Practice, p. 115) is not of frequent occurrence, but I ought to notice it as regards the effect of Order XXX. on it. I submit that clearly the plaintiff could not make such an application, except by the means of a summons for directions.

As regards a defendant applying for security for costs (see my Practice, 118-121) a defendant can, of course, wait until the plaintiff issues his summons for directions, and apply for security at the hearing of it, but he need not wait for this. He can apply by independent summons as heretofore before the plaintiff has issued his summons for directions. The best course is, however, manifestly to wait, for if the summons for directions is taken out the application can then be made, and if it is not the defendant has a simpler course, namely, to apply to dismiss the action for want of prosecution, by reason of no summons for directions having been issued.

Discontinuance (see my Practice, 128) is a convenient mode of a plaintiff ending an action. Has Order XXX. affected this? Mr. Stringer in his work treats it as an open question, depending upon whether dis-

continuance is a fresh step in the action within the meaning of Order XXX. He says: "If it is, then the plaintiff must clearly issue a summons for directions, and ask for leave to discontinue. If it is not, then he is entitled to serve notice to discontinue without applying for directions." He finally comes to the conclusion—and I think the right one—that if it is a total discontinuance against a sole defendant or all the defendants, then the plaintiff can discontinue without issuing a summons for directions, but that it is otherwise if it is in any sense a partial discontinuance, whether it consists of discontinuance against one or some of several defendants or discontinuance of part only of the claims.

It is necessary to consider the point of how Order XXX. has affected procedure on counterclaims (see my Practice, p. 80). For certain purposes a counterclaim is considered as a separate action, but it in fact is not a separate action, for an action is a proceeding commenced by writ. Still there may be doubts on the subject. If the counterclaim is considered for the purposes of Order XXX. as a separate action then, besides the plaintiff's summons for directions, there must be one by the defendant in respect of his counterclaim. This, however, is not the view that is acted upon at Chambers, for they there for the purposes of Order XXX. consider the counterclaim as an integral part of the action. No difficulty therefore appears to exist here provided that some part of the original action is still remaining, for the plaintiff takes out his summons for directions, and on it the defendant can apply for and obtain any directions he requires in respect of his counterclaim. Suppose, however, that the writ being specially indorsed, the defendant puts in his defence before any summons for directions is taken out, and in that defence he entirely admits the plaintiff's claim and sets up a counterclaim, surely there cannot be any necessity for the plaintiff to take out a summons for directions. Should the defendant then be treated as a plaintiff, and is it his duty to take out such a summons? The point has not as far as I know been decided, and Mr. Stringer, in his work to which I have referred (p. 139), appears to be in great doubt about it. I submit that in such a case the defendant should be considered as the plaintiff, and should take out such a summons. Here, again, we see the doubts produced by Order XXX., which contains haphazard provisions without any apparent consideration of the existing practice.

I have in my remarks so far dealt mainly with practice at the Queen's Bench Division, but more or less the same remarks apply to the Chancery Division. We have there the same general course of procedure, but then it must be remembered that there are certain matters of procedure peculiar to the Chancery Division. In the Chancery Division in the great majority of cases, the plaintiff is not seeking an immediate judgment for money, but he wants accounts and inquiries, *e.g.*, in an administration suit. Supposing the defendant in an action of this kind does not appear, the course of procedure has been for the plaintiff to file a statement of claim, and after waiting 10 days set down the action on motion for judgment (see my Practice, p. 191). It is quite clear

that Order XXX. does not affect the procedure here, which remains as before, for the summons is only taken out after appearance. But there is another case in which the plaintiff can proceed by motion for judgment. Thus suppose in an action of the class to which I have referred the defendant makes default in putting in a defence after he has entered an appearance. It seems that Order XXX. compels the plaintiff to take out a summons for directions, and that he cannot deliver a statement of claim with a view to quickly getting the action heard, so that her delay is occasioned most unnecessarily. Or again, supposing one defendant appears and another does not, here we must have a summons for directions, and I suppose the proper application to make on it is for leave to deliver a statement of claim against the defendant who has appeared, and file it against the defendant who has not appeared. I do not think there are any other matters peculiar to the Chancery Division which require special attention.

The conclusion to which I have ventured to come, is that Order XXX is a good idea but not as it stands. It has been rushed, without thought, into the existing system of practice, and has in many respects caused chaos. The officials and practitioners are getting to understand it, and to know where it is good and where it is bad or even absurd. As soon as the practice has a little settled down, and the doubts and difficulties are fully appreciated, it appears to me that there will be a grand opportunity for a reconsideration of the whole of the rules of Court, and it is to be hoped that this will be done. In the meantime it is necessary for practitioners and students to understand the matter as they stood, before Order XXX. came into operation, and then to consider its provisions and how they affect the previously existing practice. I trust that this Supplement may assist some of my readers in arriving at this much to be desired result. It forms in substance a reprint of an article which I published in this month's issue of the *Law Students' Journal*.

JOHN INDERMAUR.

22 CHANCERY LANE, *March 1899.*

A

MANUAL OF THE PRACTICE

OF THE

SUPREME COURT OF JUDICATURE.

PART I.

OF THE COURTS, THE JUDGES AND OFFICERS
THEREOF; AND OF PARTIES TO ACTIONS
AND JOINDER OF CAUSES OF ACTION.

CHAPTER I.

THE FORMER COURTS AND THE PRACTICE THEREIN.

THE Supreme Court of Judicature Acts of 1873 (*a*) and 1875 (*b*), together with the Rules of Court thereunder, although to a great extent constituting in themselves a new practice, yet require at the outset for their proper understanding some slight explanation of the former Courts, and the practice therein, especially as, where no provision is made on the subject, the jurisdiction of the Courts is to be exercised as nearly as can be in the same manner as formerly (*c*), and the former procedure remains in force. All, however, that is sought in the present chapter is to give the student some information purely general in its nature.

(*a*) 36 & 37 Vict. c. 66.

(*b*) 38 & 39 Vict. c. 77.

(*c*) Jud. Act, 1873, s. 23 ; Order LXXII. r. 2.

The Courts of
Common Law.

Aula Regis.

The Courts of Common Law were older in their origin than the Court of Chancery, being, indeed, the outcome of a very ancient body called the *Aula Regis*. In this Court the Sovereign was Judge, and the Court followed the Sovereign wherever he went over the country, the inconvenience of which was found to be so great that it was enacted by Magna Charta that "Common Pleas" should no longer follow the King's person, but be held in some fixed place. In consequence of this enactment the Court of Common Pleas (so called in contradistinction to Crown Pleas) was established at Westminster, and all ordinary civil matters were determined there. Later in Edward the First's reign the Court of Exchequer was carved out of the *Aula Regis* for the determination and management of Revenue matters, and the remnant of the *Aula Regis* was styled the King's Bench, and continued, as the old *Aula Regis* had done, to possess a criminal jurisdiction and also a superintending power over the inferior tribunals in the kingdom. By certain fictions which it appears unnecessary now to explain, the Court of Exchequer and the Court of King's Bench acquired full civil jurisdiction as well as the Court of Common Pleas.

Three Common
Law Courts.

The Common Law Courts became, therefore, three in number, viz., the Court of King's or Queen's Bench, the Court of Common Pleas, and the Court of Exchequer. At the time the Judicature Acts came into operation, actions were brought in common in any one of these Courts as the litigant chose, but each had also some exclusive jurisdiction; particularly, the Court of Queen's Bench had an exclusive power over inferior tribunals, and also a general criminal jurisdiction; the Court of Common Pleas had an exclusive jurisdiction in actions relating to dower, and in appeals from decisions of revising barristers as to registration of electors; and the Court of Exchequer had an exclusive jurisdiction in Revenue matters.

At the time the Judicature Acts came into operation the Courts of Common Law comprised fifteen Judges, viz., the Lord Chief Justice of England, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, and twelve puisne Judges, or Judges of less degree. Appeals lay, in the first instance, to a Court known as the Exchequer Chamber, and from thence to the House of Lords.

Former Judges
at Common
Law.

The Court of Chancery arose from the defects of these Courts of Common Law. For every right there was supposed to exist at Common Law a certain proper form of writ, but in respect of some matters for which clearly relief ought to have been given no form of writ was found, and the practice therefore grew up of applying to the Sovereign in person, asking him as a matter of favour to give the required remedy. The Sovereign generally deputed such applications to his Lord Chancellor, and therefore gradually the practice grew up of applying direct to the Chancellor, who thus in himself originally constituted the Court of Chancery (*d*).

The Court of
Chancery.

At the time of the coming into operation of the Judicature Acts, the Court of Chancery comprised seven Judges, viz., the Lord Chancellor and two Lords Justices constituting — either sitting together or separately — a Court of Appeal, and the Master of the Rolls and three Vice-Chancellors. The Lord Chancellor, as before explained, was the first Judge in Chancery; the Master of the Rolls was originally merely a master in Chancery to whom certain matters were referred, and, by a gradual development, his position assumed that of an independent Judge, being finally settled by statute; the three Vice-Chancellors were appointed respectively in 1811 and 1842, and the Lords Justices in 1851. On account of his more

Former Judges
in Chancery.

ancient origin the Master of the Rolls ranked next to the Lord Chancellor in order of precedence. The ultimate Court of Appeal was, as at Common Law, the House of Lords.

Difference in relief at Law and in Equity.

The Courts of Law were governed by strict rules, but it was different with the Court of Chancery in its origin. There at first justice was meted out according to the conscience of each particular Chancellor; but gradually this ceased to be the case. Equity was modelled from time to time by various Judges, and by legislative enactments, so that, at the time of the Judicature Acts, Courts of Equity were as much bound by legislative enactments and precedent decisions as were the Courts of Law.

Inconvenience of the two distinct systems of Law and Equity.

These two different systems of Law and Equity had therefore their origin naturally enough, but however satisfactory in theory was their separate existence, it could hardly be said to be so in practice, for in some cases the litigant ran the risk of applying for relief to the wrong Court, and, thus failing, having to bear the cost of his proceedings and commence over again in the right Court; in other matters the one Court could give a partial relief, and for complete relief the assistance of the other had also to be obtained, and there was besides a wide difference in the practice.

It will now be best to give shortly an outline of the former practice in the Courts of Common Law and the Court of Chancery respectively, so that the student may be able to compare some points of the old with the new practice given throughout this work, and thus see with greater force the nature and effect of the alterations.

Former Common Law practice.

The first step in an ordinary Common Law action was a writ of summons, being in its main particulars

the same as a writ of summons under the present Writ. practice. This was served on the defendant, and on his failing to appear thereto within eight days judgment was signed, much the same as under the present practice. If he appeared the pleadings then commenced.

The first pleading in the action was a declaration, Declaration. being a written statement of the plaintiff's case, conched in many particulars in technical language, and frequently in its technicalities involving much repetition, and running on to considerable length. This was delivered to the defendant's solicitor—or attorney, as he was called at law—with a notice indorsed thereon requiring him to plead thereto within eight days.

The next step was a plea by the defendant, being a Plea. written statement of his case, and, like a declaration, often very lengthy and technical.

The plaintiff then delivered a replication, which Replication. was usually simply a joinder of issue, viz., a direct denial of the points urged by the defendant, and if this were so the pleadings were then ended, for the great object of pleadings was, and indeed still is, to arrive at a direct point in issue between the plaintiff and defendant. Sometimes, however, a direct issue could not be then arrived at, and it became necessary to have subsequent pleadings to attain that object, and these were called the rejoinder, the surrejoinder, the rebutter, and the surrebutter, and if it were necessary to still further continue the pleadings, after this they Rejoinder, surrejoinder, rebutter, and surrebutter. had no distinctive names. However, for them to go as far as this did not often occur; they usually terminated with the replication.

Issue having been joined, the next step was notice Notice of trial. of trial by the plaintiff.

Verdict, judgment, and execution. The cause then came on to be heard in due course, the evidence at the trial being *viva voce*, and then followed verdict, judgment, and execution.

Former Chancery practice. Bill of complaint. The first step in an ordinary Chancery suit was a bill of complaint, which was a printed (e) document containing a full and detailed statement of the plaintiff's case. This having been filed, a sealed copy was served on the defendant, and he appeared thereto within eight days.

Interrogatories. An almost invariable practice was then for the plaintiff to file interrogatories, being substantially the bill of complaint put into the form of questions. To these interrogatories the defendant was bound to put in an answer, which practically contained his defence.

Answer. If the plaintiff did not deliver interrogatories it was open to the defendant to put in a voluntary answer, which was practically a voluntary defence. The bill and answer (if any), or, if none, the bill alone, thus formed the pleadings in a Chancery suit.

Notice of motion for decree. The most usual course (f) then to bring the cause to a hearing was for the plaintiff to give to the defendant notice of motion for decree, which was a notice that he intended to apply to the Court to give him the relief he considered himself entitled to. The evidence was not *viva voce*, as at Common Law, but by affidavits, the plaintiff first filing his affidavits in support, then the defendant his in answer thereto, and finally the plaintiff filing any further affidavits in reply on any new points appearing from the defendant's evidence. The cause was then set down, and in due course came on to be heard.

Difference in One of the great differences under the old system—

(e) In some few cases where expedition was required a written bill could be filed, but a printed copy had to be filed afterwards within fourteen days.

(f) It is unnecessary to refer to the other courses.

and one which will hereafter be touched on under the present practice—was in the kind of case that usually came before the Court of Chancery and the Courts of Law respectively. In a Court of Law the plaintiff was almost invariably only suing to recover a sum of money, and on the hearing of the cause the whole matter could be disposed of by the verdict of the jury and the judgment founded thereon. But in Chancery this was usually different; there the plaintiff was frequently proceeding in respect of matters of intricacy, and in almost all cases in matters which involved more than could be settled in open Court. For instance, in an administration suit, it would have been impossible for the whole matter at once to have been disposed of in open Court. It was necessarily impossible for the Court to then and there find out what the estate consisted of, what were the debts, who were the parties interested, and so on. So again, take a suit for dissolution of a partnership, and for the partnership accounts to be taken, how could the Court dispose of this at once? It was manifestly impossible. And this was so in the great majority of cases. This should be well noticed by the student, for though dwelt upon here primarily as explaining the former practice, it also explains the present; for there still exists a distinction between the majority of cases coming before the Chancery Division on the one hand, and the Queen's Bench Division on the other hand, as will be hereafter seen.

the nature of the cases that usually came before Courts of Law and Equity respectively.

At the hearing of the cause, then, the Court, being Decree. unable to dispose of the whole matter at that time, made a decree directing certain accounts and inquiries to be taken and made—thus, in an administration suit, amongst others, an account of the testator's personal estate, an account of his debts, an inquiry as to the persons beneficially interested, &c.; or in a partnership suit, an account of the partnership assets, of the proportion in which each was entitled, &c.

Chief Clerk's certificate. The decree was then, after having been drawn up, carried into Chambers and worked out before the Judge's Chief Clerk, who finally made his certificate of the result of the accounts and inquiries referred to him. Then on this certificate the cause came before the Court again on what was called a hearing on further consideration, when the Court made its final decree, called an order on further consideration. This order usually brought the suit to a conclusion.

Order on further consideration.

Summary. The following statement, in columns, contrasts at a glance the most usual points in the Common Law and Chancery procedure respectively:—

<i>Common Law.</i>	<i>Chancery.</i>
Writ of summons by plaintiff and service thereof.	Bill of complaint by plaintiff and service thereof.
Appearance by defendant.	Appearance by defendant.
Declaration by plaintiff.	Answer by defendant founded on interrogatories administered by plaintiff. If no interrogatories administered, no answer necessary; but a voluntary answer might be put in.
Plea by defendant.	
Replication by plaintiff.	
(Occasionally subsequent proceedings, being rejoinder by defendant, surrejoinder by plaintiff, rebutter by defendant, surrebutter by plaintiff, &c.	
Notice of trial by plaintiff.	Notice of motion for decree by plaintiff, followed by affidavits by plaintiff, then by defendant in answer, and then by plaintiff in reply.
Entry of cause for trial.	Entry of cause for trial.
Cause heard by Judge and jury, verdict, judgment, and execution.	Cause heard by Judge, and decree made directing accounts and inquiries to be taken and made.
	Decree carried into Chambers, and summons taken out to proceed thereon.
	Evidence brought in before Chief Clerk on accounts and inquiries.
	Chief Clerk's certificate.

*Common Law.**Chancery.*

Cause set down for hearing on further consideration.

Hearing on further consideration, when final decree made disposing of the whole matter. (In many cases, however, the matter could not be finally disposed of even then., *e.g.*, if there were infants wards of Court, and then liberty was given to apply to the Court at any time, and further consideration reserved.)

The foregoing is of course but an outline of the most usual former proceedings. The student must not imagine that the various matters he reads of in the subsequent pages are necessarily new, as many of them are similar to the old practice. To detail further the former procedure would probably tend to confuse the student.

The Judicature Acts were not the first steps taken for the fusion of the two systems of Law and Equity. From time to time Acts had been passed giving to the Courts of Law certain powers before only exercised by Courts of Equity, and to the Courts of Equity powers before only exercised by the Courts of Law. Now the final step towards fusion has been taken by the Judicature Act, 1873, the objects of that Act being to do away with separate Courts for different matters, to abolish the anomaly of the existence of two distinct tribunals, and to assimilate the whole practice as much as possible. The constitution of the Courts under the Judicature Acts of 1873 and 1875 and the various Rules of Court now in force will be found detailed in the next chapter.

Fusion.

Judicature
Act, 1873.

CHAPTER II.

THE PRESENT COURTS.

The Supreme
Court of
Judicature.

By the Judicature Act, 1873, the former Courts, viz., (1) the Court of Chancery, (2) the Court of Queen's Bench, (3) the Court of Common Pleas, (4) the Court of Exchequer, (5) the Court of Admiralty, (6) the Court of Probate, and (7) the Divorce Court (*a*), are united and consolidated into one Court called the "Supreme Court of Judicature," which is divided out into two permanent divisions, viz., "Her Majesty's High Court of Justice" for original jurisdiction and certain appellate jurisdiction from inferior Courts, and "Her Majesty's Court of Appeal" for appellate jurisdiction (*b*). The Judicature Acts came into operation on the 1st of November 1875 (*c*).

It is necessary that, before proceeding to the present actual practice of the Courts, the student should have some idea of their constitution, and also of the Judges or officers who preside in them or assist in carrying out the details of practice.

Constitution of
the High Court
of Justice.

To deal first with the High Court of Justice. There were at first five divisions in this Court, corresponding with the previous Courts, which, as just stated, are united and consolidated into one, viz.,

(*a*) No reference to the origin of or practice in these three last-mentioned Courts is made in this work, as being beyond its scope.

(*b*) Jud. Act, 1873, ss. 3, 4.

(*c*) Except as to House of Lords, as to which see post, p. 28.

(1) the Chancery Division, (2) the Queen's Bench Division, (3) the Common Pleas Division, (4) the Exchequer Division, and (5) the Probate, Divorce, and Admiralty Division (*d*). The previous Judges of the different Courts were made Judges of the High Court (*e*), and they at first generally sat in Divisions synonymous with the previous Courts; but this did not prevent any Judge from sitting when required in any Divisional Court, and any Judge might be transferred from one Division to another by Her Majesty under her royal sign manual (*f*). The Judge who was chief of any formerly existing Court was president of the analogous Division, viz., (1) the Lord Chancellor; (2) the Lord Chief Justice of England; (3) the Lord Chief Justice of the Court of Common Pleas; (4) the Lord Chief Baron of the Exchequer; and of (5) the originally existing Judge of the Court of Probate was made President, but subject thereto the senior Judge of such Division (*g*). When any vacant judgeships occur new Judges may be appointed by letters patent (*h*). The Judges (other than the Lord Chancellor) hold their offices for life subject to a power of removal by Her Majesty on an address presented by both houses of Parliament (*i*). The Judges.

By an Order in Council dated 16th December 1880, Order in Council. and which was issued on 6th January 1881, and came into operation on 26th February 1881 (*j*), it was ordered that the number of the Divisions of Her Majesty's High Court of Justice should be reduced by the consolidation and union of all the Judges then attached respectively to the Queen's Bench Division, the Common Pleas Division, and the Exchequer Division, in one Division called "The Queen's Bench Division," under the presidency of the Lord Chief

(*d*) Jud. Act, 1873, s. 31.

(*e*) Ibid. s. 5.

(*f*) Ibid. s. 31.

(*g*) Ibid.

(*h*) Ibid. s. 5.

(*i*) Jud. Act, 1875, s. 5.

(*j*) Made by the authority of sect. 32 of the Jud. Act, 1873.

Justice of England, and that the offices of Lord Chief Justice of the Common Pleas and Lord Chief Baron of the Exchequer, being then vacant, should be reduced to an equality with the offices of the other Judges of Her Majesty's High Court of Justice who are not *ex officio* Judges of Her Majesty's Court of Appeal, by the abolition of the said titles and all ranks and dignities relating thereto. By force of this Order the Divisions above mentioned and numbered 2, 3, and 4 respectively, now constitute one Division, viz., "The Queen's Bench Division," which may for practical purposes be well styled the Common Law Division as opposed to that numbered 1, viz., the Chancery Division.

Jurisdiction
vested in the
High Court.

As these formerly existing Courts are consolidated into one, it follows that the High Court of Justice should have vested in it all their original jurisdiction, which is, indeed, specially provided; and it has also vested in it the jurisdiction of the Court of Common Pleas at Lancaster, the Court of Pleas at Durham, and the Court created by Commissions of Assize, Oyer and Terminer, and of Gaol Delivery, and this is to include the jurisdiction vested in the Judges of the said Courts sitting in Court or Chambers, or elsewhere, in pursuance of any statute, law, or custom (*k*). But it is specially provided that there shall *not* be transferred to the said Court the jurisdiction of the Court of Appeal in Chancery, or of the same Court in Bankruptcy, the jurisdiction of the Court of Appeal in Chancery of the County Palatine of Lancaster, the lunacy jurisdiction formerly vested in the Lord Chancellor and Lords Justices (*l*), the jurisdiction vested in the Lord Chancellor in relation to grants of letters patent, or as

(*k*) Jud. Act, 1873, s. 16, amended by Jud. Act, 1875, s. 9.

(*l*) With regard to lunacy matters generally, it may be convenient to here notice that by sect. 7 of the Judicature Act, 1875, it is provided that such jurisdiction shall be vested in such judges of the Court of Appeal (including the Lord Chancellor) or High Court as may be entrusted by the sign manual of the Queen or her successors with the care and commitment of the persons and estates of lunatics. By sect. 18 of the

visitor of any college, and any jurisdiction of the Master of the Rolls in relation to records (*m*).

By the Bankruptcy Act, 1883 (*n*), the High Court Bankruptcy. has now acquired jurisdiction in bankruptcy, the London Bankruptcy Court being consolidated with the Supreme Court of Judicature, and all bankruptcy matters being entitled "In Bankruptcy." Bankruptcy business is assigned specially to the Queen's Bench Division, and is under the direction of a particular Judge.

With regard to the distribution of business amongst the different Divisions of the Court, generally the same matters as would have before been within the exclusive and peculiar jurisdiction of each different Court (*o*), are now within the exclusive and peculiar jurisdiction of the corresponding Division. In particular the following matters are assigned to the Chancery Division of the Court: Distribution of business amongst the different Divisions.

Matters within the exclusive jurisdiction of the Chancery Division.

- (1) All causes and matters pending in the Court of Chancery at the commencement of the Act.
- (2) All causes and matters to be commenced after the commencement of the Act under any Act of Parliament by which exclusive jurisdiction in respect of such causes or matters has been given to the Court of Chancery or to any Judges or Judge thereof respectively, except appeals from County Courts.
- (3) All causes and matters for any of the following purposes:

Judicature Act, 1875, appeals in lunacy matters lie to the Court of Appeal (see post, p. 18), and from thence to the House of Lords under sect. 3 of the Appellate Jurisdiction Act, 1876.

(*m*) Jud. Act, 1873, s. 17.

(*n*) 46 & 47 Vict. c. 52, ss. 92, 93, 94.

(*o*) See ante, pp. 6, 7.

The administration of the estates of deceased persons ;
 The dissolution of partnerships or the taking of partnership or other account ;
 The redemption or foreclosure of mortgages ;
 The raising of portions or other charges on land ;
 The sale and distribution of the proceeds of property subject to any lien or charge ;
 The execution of trusts, charitable or private ;
 The rectification or setting aside or cancellation of deeds or other written instruments ;
 The specific performance of contracts between vendors and purchasers of real estates, including contracts for leases ;
 The partition or sale of real estate ;
 The wardship of infants and the care of infants' estates (*p*).

Choices of
Division

Primarily the plaintiff is allowed an absolute choice of which Division he will commence his action in, but if he commences it in a Division to which it should not have been assigned, the Court may, on summary application, transfer it to the proper Division, or retain the same in the Division in which it has been commenced ; and an action must not be commenced in the Probate, Divorce, and Admiralty Division, unless formerly it could have been commenced in one of those Courts(*q*).

Transferring
action to an-
other Division.

There is also full discretionary power of transfer of any cause or matter from one Division to another by order of the Lord Chancellor, or of the Court, or any Judge of the Division to which the same is assigned,

(*p*) Jud. Act, 1873, s. 34.

(*q*) Jud. Act, 1875, s. 11.

provided that no transfer can be made without the consent of the President of the Division to which the cause or matter is proposed to be transferred (r).

By the Order in Council already referred to (s) it ^{Order in Council.} was ordered that all causes and matters then pending in any of the three divisions so united and consolidated, as before stated, should be transferred to the Queen's Bench Division to be so formed as aforesaid, and that all proceedings of every kind which might be then pending in any such causes or matters should be continued, carried on, and completed in the Queen's Bench Division to be so formed as aforesaid, in the same manner in all respects as they would have been in the Division to which they were previously assigned if the same had not been united or consolidated with such other two Divisions as aforesaid; that all causes, matters, and other proceedings, which by or under the Supreme Court of Judicature Act, 1873, or any Act amending the same, or any rule or order made pursuant thereto, have been or are assigned to the Queen's Bench Division, the Common Pleas Division, and the Exchequer Division respectively, should in future be assigned to the Queen's Bench Division, to be formed by such consolidation and union as aforesaid; that all proceedings which have heretofore, by any law or custom other than such Acts of Parliament, rules, and orders as aforesaid, been taken or had respectively in the Queen's Bench Division, the Common Pleas Division, and the Exchequer Division of the said High Court of Justice, should be in future taken and had in the Queen's Bench Division, to be so formed by such consolidation and union as aforesaid; and that all powers and authorities which by any law or custom have heretofore been exercised by the Chief Justice of the Common Pleas and the Chief Baron of the

(r) Order XLIX. IT. 1, 3.
 (s) Ante, p. 11.

Exchequer respectively, should in future be capable of being exercised by the Lord Chief Justice of England, unless such exercise thereof should be contrary or repugnant to any express provision in any Act of Parliament contained.

District
Registries.

To facilitate the prosecution in country districts of certain proceedings in an action, provision has been made for the establishment throughout the country of District Registries (*t*), where actions (other than Probate actions) may be commenced and continued down to and including final judgment (*u*). Where an action proceeds in a District Registry, the District Registrar may exercise all such authority and jurisdiction in respect of the action as may be exercised by a Judge in Chambers, except such as a Master of the Supreme Court is precluded from exercising (*v*); and particularly he may grant leave to enter judgments under Order XVI. Rules 50, 51 (*w*), issue or renew writs of execution, examine judgment debtors for garnishee purposes, grant garnishee orders and charging orders *nisi*, and make interpleader orders (*x*). Where an action proceeds in a District Registry all proceedings relating to the following matters, namely, (a) leave to enter judgments under Order XVI. Rules 50, 51, (b) leave to issue or renew writs of execution, (c) examination of judgment debtors for garnishee purposes, (d) garnishee orders, and (e) charging orders *nisi*, shall, unless the Court or a Judge otherwise order, be taken in the District Registry (*y*).

Judgment in
District
Registry.

When a writ issues in a District Registry and the plaintiff is entitled to sign judgment by default, either

(*t*) Jud. Act, 1873, s. 60, amended by Jud. Act, 1875, s. 13.

(*u*) Order v. As to the practice in District Registries, see Order xxxv. When an action may be removed from District Registries, see post, pp. 116-117.

(*v*) Order xxxv. r. 6. As to which see post, p. 21, note (*s*).

(*w*) That is, on third-party procedure, as to which see post, pp. 34, 35.

(*x*) Order xxxv. rr. 5, 5*a*.

(*y*) Ibid.

final or interlocutory, or where an action is proceeding in a District Registry and the plaintiff is entitled to sign judgment by default, either final or interlocutory, the same is signed in the District Registry (*z*). Also where judgment is signed in a District Registry, taxation of costs and the issuing of writs of execution take place there (*a*).

If any matter appears to a District Registrar proper for the decision of a Judge, the Registrar may refer the same to him; and any party dissatisfied with a District Registrar's decision may appeal to a Judge, and this notwithstanding that the matter was one in respect of which the District Registrar had jurisdiction only by consent. Such appeal is by way of indorsement on the summons by the Registrar at the request of any party, or by a notice in writing to attend before the Judge, without a fresh summons, within six days after the party complaining has notice of the District Registrar's decision; but such appeal is no stay of execution (*b*).

Matters in the Chancery Division, as well as in the Queen's Bench Division, may as far as possible go on in the District Registry, and in such case all certificates and other documents used in London and requiring to be filed are filed in London if not already filed in the District Registry, and, if the Court or Judge so direct, office copies thereof are transmitted to the District Registry (*c*). Every reference to a Judge by, or appeal to a Judge from, a District Registrar in any cause or matter in the Chancery Division must be to the Judge to whom the cause or matter is assigned (*d*).

The offices of each District Registrar of the High Court of Justice are open on every day and hour in

(*z*) Order xxxv r. 2
(*c*) Ibid. r. 21.

(*a*) Ibid. r. 4.
(*d*) Ibid. r. 12.

(*b*) Ibid. rr. 8, 9, 10.

the year on which the offices of the Registrar of the County Court of the place in which the District Registry is situate are required to be kept open (*e*), but the office of the District Registry in Manchester is not open in any year on the five days next following Whit Monday (*f*).

Constitution of
Her Majesty's
Court of
Appeal.

To deal secondly with her Majesty's Court of Appeal. This Court is now composed of four *ex officio* Judges, viz., the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, and the President of the Probate Division, and there are in addition five ordinary Judges, who are styled "Justices of Appeal" (*g*). In addition to the Judges mentioned, the Lord Chancellor has power to request the attendance of any Judge of any Division of the High Court, except during the time of the spring or summer circuits, as an additional Judge (*h*).

Jurisdiction
vested in the
Court of
Appeal.

All the jurisdiction and powers formerly vested in any of the following Courts or persons are now vested in the Court of Appeal, viz.: (1) In the Lord Chancellor and Court of Appeal in Chancery in the exercise of his and its appellate jurisdiction, and also as a Court of Bankruptcy Appeal. (2) In the Court of Appeal in Chancery of the County Palatine of Lancaster, or of the Chancellor of the Duchy and said county palatine. (3) In the Lord Warden of the Stannaries, or in the Lord Warden sitting in his capacity as judge. (4) In the Court of Exchequer Chamber; and (5) In Her Majesty in Council, or the Judicial Committee of the Privy Council, upon appeal from any judgment or order of the High Court of Admiralty, or from any order of

(*e*) Order LXIII. r. 7.

(*f*) Ibid. r. 10.

(*g*) Jud. Act, 1875, s. 4, amended by 39 & 40 Vict. c. 59, s. 15, and 44 & 45 Vict. c. 68. The Master of the Rolls sits only in the Court of Appeal (44 & 45 Vict. c. 68, s. 2).

(*h*) Jud. Act, 1875, s. 4, amended by 39 & 40 Vict. c. 17.

lunacy made by the Lord Chancellor or any other person having jurisdiction in lunacy (*i*).

The sittings of the Court of Appeal, or in London Sittings of the Court. or Middlesex of the High Court of Justice, are four in every year, viz.: (1) The Michaelmas Sittings, which now commence on the 24th of October and end on the 21st of December; (2) The Hilary Sittings, which commence on the 11th of January and end on the Wednesday before Easter; (3) The Easter Sittings, which commence on the Tuesday after Easter week and end on the Friday before Whit Sunday; and (4) The Trinity Sittings, which commence on the Tuesday after Whitsun week and terminate on the 12th of August (*ii*). These sittings are nearly identical with the formerly existing terms, which are abolished so far as they relate to the administration of justice. The Vacations that now Vacations, holidays, &c. exist are four, viz.: the Long, Christmas, Easter, and Whitsun, of which the Long commences on the 13th of August and terminates on the 23rd of October (*j*) and during this time no pleading can be amended or delivered unless directed by a Court or Judge, nor is the time of the Long Vacation reckoned in the time Time. allowed for filing, amending, or delivering any pleading unless otherwise directed by a Court or Judge. Besides this, where the time limited for doing any act is less than six days, Sunday, Christmas Day, and Good Sundays, &c. Friday are not counted, and where the last day for doing any act which cannot be done when the offices are closed, expires on a Sunday or other day when they are closed, it is considered duly done if done on the first day when the offices are open (*jj*). In any case in which any particular number of days not expressed to be clear days is prescribed by Rules of

(*i*) Jud. Act, 1873, s. 18.

(*ii*) Order LXIII. rule 1, as amended by Order in Council, dated 12 Dec. 1883.

(*j*) Order LXIII. rule 4, as amended by Order in Council, dated 12 Dec. 1883.

(*jj*) Order LXIV. rr. 2, 3.

Court, the same are reckoned exclusively of the first day and inclusively of the last (*k*). It is not necessary for the Courts to sit on the day appointed to be kept as the Queen's Birthday (*l*), but the offices of the Supreme Court must be open on every day of the year except Sundays, Good Friday, Easter Eve, Monday and Tuesday in Easter week, Whit Monday, Christmas Day and the next following working day, and all days appointed by proclamation to be observed as days of general fast, humiliation, or thanksgiving (*m*). The general business hours of the offices of the Supreme Court are 10 to 4, and Saturdays 10 to 2, except in vacations, when the hours are 10 to 2 on all days (*n*). During vacations two Judges act as Vacation Judges, and may sit separately, or together as a Divisional Court as occasion may require (*o*).

Circuits.

The powers of issuing commissions of assize are kept alive, subject to arrangements between the Judges of the High Court. Only the Judges of the Queen's Bench Division go circuit in the ordinary way, but any ordinary Judge of the Court of Appeal (except the Master of the Rolls), or Judge of the Chancery Division, may be included in the Commission. A new circuit scheme has recently (*p*) been devised, under which the assizes are to be held throughout the country contemporaneously with the Sittings of the High Court in London. There are now four circuits—Autumn, Winter, Easter, and Summer. The Autumn Circuit begins October 25th and ends December 21st, and is chiefly confined to Criminal business, as Civil business is only taken at Leeds, Liverpool, Manchester, Swansea and Birmingham. The Winter Circuit begins January 11th and ends March 28th, both Civil and

New circuit scheme.

(*k*) Order XLIV. r. 12.

(*l*) Order LXIII. r. 2.

(*m*) Ibid. r. 6.

(*n*) Ibid. rr. 8, 9.

(*o*) Ibid. rr. 11, 12.

(*p*) Order in Council of 28th July 1893, amended by Order in Council dated 28th May 1894. See Annual Practice (1897), vol. ii. 379–384.

Criminal business being taken. The Easter Circuit begins April 11th and ends May 18th (*q*), but is confined to Leeds (Criminal business only) and to Liverpool and Manchester. The Summer Circuit begins May 29th and ends August 12th, both Civil and Criminal business being taken. When the whole duties of the circuits cannot be performed by the Judges, certain persons may be appointed Commissioners for the purpose of presiding thereat (*r*).

There are various officers of the Courts besides the Judges. In the Queen's Bench Division may be mentioned the Masters, the Associates, and the Sheriffs. There are also in the Chancery Division, the Masters (who were until lately styled Chief Clerks (*rr*)), the Registrars, the Paymaster-General, the Examiners, the Taxing Masters, and the Conveyancing Counsel of the Court. Officers of the Courts.

The Masters in the Queen's Bench Division attend in The Masters. Chambers to dispose of various matters, and to tax costs, and to dispose of any matters referred to them by the Judges—*e.g.*, actions involving questions of account (*s*).

(*q*) But when Whit Sunday falls before the 21st of May, this date is to be altered so as to enable the circuits to be finished on the Thursday before Whit Sunday.

(*r*) Jud. Act, 1873, ss. 29, 37.

(*rr*) The alteration only dates from Feb. 1897 and was effected by an order of the Lord Chancellor with the concurrence of the Lord Chief Justice and the sanction of the Treasury. It is an alteration in name only, but, strictly speaking, the office of "Chief Clerk" has ceased to exist, and "Master" must be read instead of "Chief Clerk" in the Rules.

(*s*) It has been specially provided that the Masters shall have no jurisdiction in certain matters, viz. :

- (a) All matters relating to criminal proceedings or to the liberty of the subject.
- (b) The granting leave for service out of the jurisdiction of a writ of summons or of notice thereof.
- (c) The removal of actions from one Division or Judge to another Division or Judge.
- (d) The settlement of issues, except by consent.
- (e) The granting of inspection and other orders under Order L. rr. 1-5.
- (f) Appeals from District Registrars.
- (g) Prohibitions.
- (h) Injunctions and other orders under sub-sect. 8 of sect. 25 of the Judicature Act, 1873.
- (i) Awarding of costs other than costs of any proceeding before such Master, and other than any costs which by the rules or by the order of the Court or a Judge he is authorized to award.

Arrangement
as to assign-
ment of actions
to Masters in
Q.B. Div., and
sittings of
Masters.

Six of the Masters in the Queen's Bench Division are selected according to a rota, to attend as Masters at Chambers during each of the four sittings in the year, three of whom sit, one in each of three rooms appropriated for that purpose, at the Chambers of the Royal Court of Justice every Monday, Wednesday, and Friday throughout the sittings, and the remaining three on Tuesdays, Thursdays, and Saturdays throughout the same sittings. Each Master occupies the same regular room, and takes all applications proper to be made in Chambers, and according to alphabetical lists (*t*), subject to this—viz, every action in London is assigned specially to one of these Masters, all proceedings being marked with his name, and then he always deals with that action subject to the same being transferred to another Master by the Lord Chief Justice, and subject also to the provision that in the particular Master's absence from illness or other urgent cause, or during any vacancy, any other Master may deal with the action (*u*). If when an action comes before a Master it has not been already thus assigned it is marked with that Master's name, and it thereupon becomes assigned to him (*v*). If a Master to whom an action has been assigned is not sitting in one of the allotted rooms according to the above arrangement, the summons may be heard by him in his own room (*w*). One of the Masters also from time to time is specially present at Chambers to control and manage the general business and arrangements, and give all necessary directions with respect to questions of practice and procedure (*x*).

Practice
Master.

The Asso-
ciates.

The duties of the Associates are to enter causes for

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- (k) Reviewing taxation of costs.
 - (l) Orders absolute for charging stocks, funds, annuities, or share of dividends, or annual proceeds thereof.
 - (m) Acknowledgments of married women (Order LIV. r. 12).
 - (t) Order LIV. rr. 13, 14, 15. (u) Order v. rr. 6, 7, 8.
 - (v) Order LIV. r. 17. (w) Ibid. r. 18.
 - (x) Order LXI. r. 2.

trial, attend in Court and take a note of what is done, and give certificates for judgment in pursuance of the Judge's directions, and other like matters.

The duties of the Sheriffs are, mainly, to carry out The Sheriffs. the judgments of the Court by enforcing the various writs of execution delivered to them.

The duties of the Masters in the Chancery Division (formerly the Chief Clerks) are to attend in the Chambers of the various Judges of the Chancery Division to whom they are attached, and to take accounts and inquiries, and dispose of various interlocutory applications arising in the course of actions, with the assistance of clerks under them, and generally the Judges have power, subject to the rules, to order what matters shall be heard and investigated before these officials (y). The Chancery Masters.

In particular certain matters are enumerated as specially to be disposed of in Chambers by Judges of the Chancery Division, all of which, at any rate in the first instance, come before the Masters, and amongst them may be mentioned the following: Special duties of the Chancery Masters.

- (1) Applications for payment or transfer out of Court, where there has been a judgment or order declaring the parties' rights, or where the title depends only on proof of identity, birth, marriage or death, AND also in all cases where the fund does not exceed £1000.

(y) Order LV. rr. 15, 17a. It is, however, specially provided that summonses under Order LV. r. 3, the object of which is to obtain the opinion of the Court or a Judge upon the construction of a document or any question of law, and any application for the appointment of a provisional liquidator, and applications for substituted service, and for service out of the jurisdiction, shall be brought before the Judge in person (Order LV. r. 15). Also that no order appointing a new trustee, or for general administration, or for the execution of a trust, or for accounts and inquiries concerning the property of a deceased person or other property held upon any trust, or concerning the parties entitled thereto, and no vesting or other order consequential on the appointment of a new trustee, shall be made except by the Judge in person. (Order LV. r. 15a).

- (2) Applications under the Trustee Act 1893 (z) for the appointment of new trustees, or for a vesting order, or with regard to a fund in Court when it does not exceed £1000.
- (3) Applications under the Infants' Settlement Act 1855 (a).
- (4) Applications as to guardianship and maintenance.
- (5) Application connected with the management of property.
- (6) Applications for or relating to the sale of property (b).

Powers of the
Masters in the
Chancery
Division.

Each Master in the Chancery Division has for the purpose of any proceedings before him full power to issue advertisements, to summon parties and witnesses, to administer oaths, to require the production of documents, and (when so directed by the Judge) to examine parties and witnesses either upon interrogatories or *viva voce* as the Judge shall direct; and any parties or witnesses neglecting to obey a summons to attend in this way are liable for contempt and may be proceeded against accordingly (c). These officials do not however in practice usually take examination of witnesses themselves, as the proper course is to let the examination take place before one of the examiners of the Court (presently mentioned) unless the circumstances of the case justify a departure from the ordinary practice, as where the amount at stake is only trifling (cc).

The Regis-
trars.

The duties of the Registrars are to enter causes for trial, to attend in Court and take minutes of the decisions given, and afterwards to draw the same up in

(z) See post, Part III. ch. v.

(b) Order L.V. r. 2.

(cc) Annual Practice (1897), 1015.

(a) Ibid.

(c) Ibid. rr. 16, 17.

proper form and settle them in the presence of the different parties or their solicitors (*d*).

The duties of the Paymaster-General are to keep the books in Chancery containing suitors' accounts of money paid into and out of Court, and draw cheques for suitors, and make investments in and bespeak sales of stock, according to the Court's orders. The Paymaster-General.

The duty of the Examiners is to preside at the examination of witnesses in some cases. The Examiners.

The Court has very full power to make orders for the attendance of any person to be examined upon oath, and to produce documents (*e*), and any person wilfully disobeying any such order is liable to attachment (*f*). The Examiner must take down the party's depositions in the presence of parties, counsel, &c., subject to cross-examination and re-examination (*g*), not ordinarily by question and answer but by way of a statement which when completed is read over to the witness and signed by him in the presence of such of the parties as think fit to attend. If the witness refuses to sign the depositions the Examiner signs them. Objections to any questions are taken down by the Examiner, who may express his opinion, but has no power to decide the point (*h*), which must be dealt with by the Court or a Judge (*i*). If a witness himself objects to any question, and the Court or a Judge decides that it must be answered, the witness may be ordered to pay the costs occasioned by his objection (*j*). The depositions before the Examiner when completed are filed in the Central Office (*k*), and the Examiner may make a special report to the Court touching the examination and the conduct or absence of any Procedure before Examiners.

(*d*) Generally as to them see Order LXII.

(*e*) Order XXXVII. r. 5.

(*g*) Ibid. r. 11.

(*i*) Ibid. r. 14.

(*k*) Ibid. r. 16.

(*f*) Ibid. r. 8.

(*h*) Ibid. r. 12.

(*j*) Ibid. r. 15.

witness (*l*). Where any written deposition of a witness has been filed, such deposition is printed unless otherwise ordered (*m*).

**The Taxing
Masters.**

The duty of the Taxing Masters is to tax solicitors' costs. They are respectively assistants to each other, and may tax or assist in taxing any bill which has been referred to any other Taxing Master (*n*).

**The Convey-
ancing
Counsel.**

The Conveyancing Counsel of the Court are certain counsel (six in number) appointed to assist the Court in matters of conveyancing; thus, if property the subject-matter of Chancery proceedings is about to be sold, the matter will be referred to one of these officers to investigate the title and prepare the conditions of sale. Where in pursuance of any direction by the Court or Judge in Chambers, drafts are settled by any of the Conveyancing Counsel, the expense of procuring such drafts to be previously or subsequently settled by other counsel on behalf of the same parties on whose behalf such drafts are settled by the Conveyancing Counsel of the Court is not allowed on taxation either between party and party, or solicitor and client, unless otherwise ordered (*o*).

**Supreme Court
of Judicature
(Officers) Act,
1879.**

With regard to some of the foregoing officers, the Supreme Court of Judicature (Officers) Act, 1879, (*p*) must be borne in mind. This Act provided (*q*) that a Central Office of the Supreme Court of Judicature should be established under the control and superintendence of officers called Masters of the Supreme Court of Judicature, in which was to be concentrated and amalgamated numerous previous offices and the

(*l*) Order xxxvii. r. 17. As to the fees to be paid Examiners, see Order xxxvii. r. 51.

(*m*) Order lxvi. r. 5.
(*n*) Order lxv. r. 19. See rules for the guidance of Taxing Masters, Order lxv. r. 27.

(*o*) Order lxv. r. 22. As to the Conveyancing Counsel generally, see Order li. rr. 7-13.

(*p*) 42 & 43 Vict. c. 78.

(*q*) Sects. 4-7.

officers therein. It was also enacted (*r*) that the business performed at the Central Office should comprise business formerly performed in the various offices amalgamated, but the several officers are to be interchangeable and capable of performing any of the duties of the office, and subject thereto, the duties of each are to remain as before. It may be remarked that this is simply a further carrying out of the idea and design of the Judicature Acts, 1873 and 1875, and has more effect in name than anything else.

It is provided that solicitors are to be deemed Solicitors. officers of the Court, and subject to the Court's jurisdiction (*rr*).

In addition to the foregoing, certain new officers were appointed by the Judicature Act, 1873—viz., ^{Referees and Assessors.} Referees and Assessors. Referees are persons to whom any matter is referred by the Court, and they may be either Official Referees, that is, permanent Referees to whom any matters may be referred, or Special Referees, that is, persons specially chosen for the one particular case. Assessors are persons having peculiar or special knowledge in any matter before the Court, and called in to assist the Court in such matter. Actions may under certain circumstances be referred to a Referee (*s*), but this subject is dealt with in a subsequent chapter (*t*).

Finally, we should notice the ultimate Court of Appeal—viz., the House of Lords, and to deal with this in its origin it is necessary for us to go back to a ^{House of Lords.} very ancient period. It would appear that in the ^{Origin of its jurisdiction as a Court of Appeal.} earliest times the House of Lords was possessed of both an original and an appellate jurisdiction in Common Law matters, both of which fell into disuse; and it seems that the House of Lords had not then any

(*r*) Sect. 12. See also Order LX. r. 3; Order LXI. r. 1.

(*rr*) Jud. Act, 1873, sect. 87.

(*s*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), sects. 13, 14.

(*t*) Chap. vi. post, p. 182.

jurisdiction in appeals from Chancery. About the time of the Restoration an attempt was made by the Lords to regain both their former jurisdictions, which, though unsuccessful with regard to the original, was successful with regard to the appellate jurisdiction; and at about the same time an appeal in Chancery matters was usurped, and after a struggle successfully so, and the jurisdiction of the House of Lords as an ultimate Court of Appeal has not since been questioned (*u*).

The constitution of the House of Lords as a Court of Appeal.

Appellate Jurisdiction Act, 1876.

But the constitution of the House of Lords as an ultimate Appellate Court has in modern times been found to be not altogether satisfactory, and consequently, by the Judicature Act, 1873 (*v*), it was proposed to abolish its jurisdiction. This provision was, however, first suspended in its operation (*w*), and then was passed the Appellate Jurisdiction Act, 1876 (*x*), which repeals the former provision, and perpetuates the House of Lords as the ultimate Appellate Court, with an improved constitution. Under its provisions there are now four Lords of Appeal in Ordinary (*y*), and it is enacted that no appeal shall be heard and determined there unless there are present not less than three Lords of Appeal, selected from the following persons: (1) the Lord Chancellor for the time being, (2) the Lords of Appeal in Ordinary, and (3) such Peers of Parliament as are for the time being holding or have held any high judicial offices (*z*). The Act also provides that appeals may be heard and determined notwithstanding Parliament may not be then sitting.

(*u*) See Brown's Law Dict. 2nd ed. p. 261, tit. "House of Lords, Jurisdiction of." See also the judicial powers of the Lords historically traced in Hallam's History of England, vol. iii. p. 17 *et seq.*

(*v*) Sect. 20.

(*w*) Jud. Act, 1875, s. 2.

(*x*) 39 & 40 Vict. c. 59.

(*y*) Sect. 6.

(*z*) Sect. 5. "High judicial office" means any of the following offices—viz., The office of Lord Chancellor of Great Britain or Ireland, or of paid Judge of the Judicial Committee of the Privy Council, or of Judge of one of her Majesty's Superior Courts of Great Britain and Ireland (sect. 25).

This must conclude our remarks on the Courts ; and ^{General} in next proceeding to the practice in them, we would ^{remarks.} only remind the student of what has already been once stated—viz., that the practice, though for the main part regulated by the Judicature Acts and the rules thereunder, yet is not entirely so, the Act of 1873 (*a*) providing that where no special provision is made, the practice of the Courts is to be as nearly in the same manner as it might have been exercised previously by the Courts from which the jurisdiction was transferred.

(*a*) Sect. 23. See also Order LXXII. r. 2.

CHAPTER III.

PARTIES TO ACTIONS AND JOINDER OF CAUSES OF ACTION.

Parties.

BEFORE commencing any action in the High Court it is very important to consider carefully who are the necessary parties to any such action, both in the capacity of plaintiffs and defendants, and how such parties should sue and be sued, and also any preliminary formalities that may, under certain circumstances, have to be observed.

Non-joinder of plaintiffs or defendants.

In the first place, a right may be vested in several persons jointly, and if so they must sue together; or again, certain persons may be liable only jointly, and if so they must be sued together. The non-joinder, however, of either plaintiffs or defendants is not in any way fatal to the action. In the event of non-joinder of persons who should have been joined in the action as co-plaintiffs the Court, if satisfied that the non-joinder was through mistake, and that it is necessary to do so, may order any person or persons to be added as plaintiffs on such terms as may seem just, his or their consent in writing, duly signed, being given thereto (*a*). The non-joinder of defendants may also equally be rectified, for they may be joined by leave of the Court or a Judge (*b*). In this latter case the course of practice is for the plaintiff to file an amended copy of and sue out a writ of summons and serve any such new defendants therewith (*c*).

(*a*) Order xvi. rr. 2, 11. *Fricker v. Van Grutten* (1896), 2 Ch. 649; 65 L. J. Ch. 823; 75 L. T. 117.

(*b*) *Ibid.* r. 11.

(*c*) Order xvi. r. 11.

All persons may be joined in one action as plaintiffs in whom any right to relief in respect of, or arising out of, the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, where if such persons brought separate actions any common question of law or fact would arise, unless the trial would be thereby embarrassed (*d*). Similarly all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative, and judgment may be given against such one or more of the defendants as may be found liable (*dd*). It of course may happen that a person is sometimes wrongly joined as a plaintiff, or wrongly made a defendant; but the misjoinder of either plaintiff or defendant is not in any way fatal to the action. In the event of misjoinder of persons as plaintiffs or defendants judgment may be given for or against such one or more as may be found entitled or found liable without any amendment, and the Court or a Judge, on such terms as may appear just, may order that the name or names of any party or parties improperly joined, whether as plaintiffs or defendants, be struck out; and generally no action is defeated by any misjoinder, but a defendant is entitled to any extra costs occasioned by the plaintiff's misjoinder. The Court or a Judge also, if satisfied that a person wrongly made plaintiff has been so made by mistake, may order any other person or persons to be substituted (*e*). Any application of the foregoing nature may be made to the Court or a Judge at any time before trial by motion or summons, or at the trial of the action in a summary manner (*ee*).

Misjoinder of
plaintiffs or
defendants.

Substitution of
plaintiff.

It is not at all necessary that the defendants to an action should all be interested to the same extent; but

Interest of
defendants, &c.

(*d*) Order xvi. rr. 1, 1*a*. This is a new provision (26 Oct. 1896), and alters to some extent the former practice as indicated in *Smurthwaite v. Hannay* (1894) A. C. 494; 63 L. J. Q. B. 737; 71 L. T. 157. See Annual Practice (1897), 352, where the alteration however, is only shewn as a proposed new Rule.

(*dd*) Order xvi r. 4.

(*e*) Ibid. rr. 1, 2, 11.

(*ee*) Ibid. r. 12.

the Court or a Judge may make such order as may appear just, to prevent any defendant being embarrassed or put to expense when he may have no interest (*f*). A plaintiff is able if several persons are liable on a contract to join them all in the same action (*g*); and if he is doubtful—whether in contract or otherwise—against which of two or more persons he can sustain a claim, he may join them all in one action, to the intent that the question as to which is liable, and to what extent, may be determined (*h*). Under this provision alternative relief of different kinds may be given against alternative defendants (*hh*).

Parties represented by trustees.

Trustees, executors, and administrators may sue and be sued on behalf of or as representing the property or estate of which they are trustees or representatives without joining any of the parties beneficially interested in the trust or estate, and they are considered as representing such parties in the action; but any such persons may, at any stage of the proceedings, be added as parties thereto. This rule applies to trustees, executors, and administrators sued in proceedings to enforce a security by foreclosure or otherwise (*i*).

Several parties with same interest.

Where there are numerous parties having the same interest, any one of such persons may sue or be sued, or be authorized by the Court to defend such action on behalf of the others (*k*); and where in any case there is a doubt who may be entitled as heir-at-law or next of kin, some person may be appointed by the Court to represent such person or persons (*l*).

Consolidation of actions.

Actions in any Division or Divisions may be consolidated by order of the Court or a Judge in the

(*f*) Order xvi. r. 5.

(*g*) Ibid. r. 6.

(*h*) Ibid. r. 7.

(*hh*) *Honduras, &c., Co. v. Tucker*, 2 Ex. D. 307.

(*i*) Order xvi. r. 8.

(*k*) Order xvi. rr. 7, 9. *Temperton v. Russell* (1893), 1 Q. B. 435; 62 L. J. Q. B. 300; *Wood v. McCarthy* (1893), 1 Q. B. 775.

(*l*) Order xvi. r. 32.

manner before in use in the Superior Courts of Common Law, and this may be done at the request of either plaintiff or defendants (*m*). This is nothing new ; when several actions are brought by the same plaintiff against several defendants, and the questions in dispute and the evidence to be adduced are the same in all, the plaintiff will, though there is no joint liability, be put to his election in which one he will proceed, and proceedings in the rest will be stayed on the defendants in the other actions submitting to be bound by the verdict in the one trial. This practice, it is said, was originally introduced by Lord Mansfield in actions against underwriters in insurance cases, and the idea is to save useless expenditure. When necessary the actions will be divided into classes, and all but one in each class stayed, and where a number of plaintiffs have commenced several actions against the same defendant the Court may under its general jurisdiction on the application of the plaintiffs enlarge the time for taking the next step in the rest of the actions until one of them has been tried as a test action. In ejectment cases, where the title is the same, several actions will be consolidated or dealt with in this manner ; and as a modern instance of the extension of the practice of consolidation may be noticed the provision of the Libel Act, 1888, that where several actions of libel are brought against different persons for substantially the same libel, they may be ordered to be tried together. In such consolidated actions the jury assess the whole damages (if any) in one sum, but a separate verdict is taken for or against each defendant as if the actions had been tried separately ; and if the jury find a verdict against the defendants in more than one of the actions consolidated, they apportion the damages between such defendants. If the Judge at the trial awards to the plaintiff the costs of the action, he

Origin of
practice.

Libel Act,
1888.

(*m*) Order XLIX. r. 8. *Martin v. Martin*, 102 *Law Times* newspaper, 17 ; *Law Students' Journal*, March 1897, p. 50.

makes such order as he deems just for apportionment of costs between such defendants (*n*).

Parties joined
in consequence
of defences.

It sometimes happens that when a defendant's defence is put in, it is found to contain some counterclaim which raises questions not only between the plaintiff and defendant, but also between third persons not parties to the action. In such a case the proper course is for the defendant in his defence to add a further title similar to the title in a statement of claim, setting forth the names of all such persons, and to deliver his defence, indorsed with the form provided, to them within the time within which he is required to deliver it to the plaintiff, and the action then proceeds against them in exactly the same way as if they had been made parties thereto, any such new party being entitled to appear and to deliver a reply within the time within which he might deliver a defence if it were a statement of claim (*p*). A simple instance of this would be as follows :—A sues B ; B has a counterclaim against A and C on a joint contract made by them. B is by this provision enabled to set it up in the action brought by A, bringing in C in the manner just detailed. It is open to the parties against whom the counterclaim is thus made to apply, at any time before reply, for an order that it be excluded on the ground that it ought not to be thus disposed of, but ought to be the subject of a separate action (*q*).

Third party
procedure.

Again, it may happen that a person who is being sued claims in the event of a judgment being recovered against him, to be entitled to contribution or indemnity from some third person not a party to the action, or there may be from some other cause a question in the action which ought to be determined not only as between the

(*n*) 51 & 52 Vict. c. 64, sect. 5. *Edison v. Dalziel*, 9 Times Reports, 334 ; Law Students' Journal, May 1893, p. 96. See further as to consolidation of actions notes to Order XLIX. r. 8, in Annual Practice (1897), 904, 905

(*p*) Order XXI. rr. 11-14.

(*q*) Order XVI. r. 15.

plaintiff and defendant, but, in addition, between the defendant and some other person. In such a case the defendant may, within the time for delivering his statement of defence, by leave of the Court or a Judge, issue and serve such third person with a notice of his claim (called the third-party notice) stamped with the seal of the Court, together with a statement of the plaintiff's claim, or, if there is not one, then with a copy of the writ in the action. If the third person desires to dispute all liability, he can enter an appearance within eight days from the service of the notice, or after that time may be allowed to appear by the Court or a Judge. If the third person, after being served as above stated, does not appear, the effect is that the defendant may let judgment go, and after satisfying it, or before satisfying it by leave of the Court or a Judge, enter judgment against the third party for the contribution or indemnity, or if the defendant goes to trial and loses the action, the Judge at the time may enter such judgment as the nature of the case may require for the defendant against the third party, but execution not to be issued thereon without leave until the defendant has first satisfied the plaintiff's judgment. If the action is disposed of otherwise than by trial, then again the Court or Judge has power, after the defendant has satisfied the plaintiff, to enter judgment for the defendant against the third party (*r*). If, however, the third party appears, then the defendant who gave the third party notice applies to the Court or Judge for directions as to the mode of determining the questions in the action, and thereupon directions may be given for trying the question of liability of the third party, and leave may be given to him to come in and defend the action, and generally the Court or a Judge has the widest powers to act as may be desirable, and to decide all questions of costs as between the third party and the other parties to the action (*s*); so that

Consequences
of non-appear-
ance of third
party.

Course on
appearance of
third party.

(*r*) Order xvi. rr. 48-51.

(*s*) Ibid. rr. 52-54. Annual Practice (1897), 434, 435.

the third party may be condemned in the costs of the action (*t*). The third party cannot, however, set up a counter-claim against the plaintiff in the action (*u*), although he may do so against the defendant who has served him with the notice (*v*).

Contribution
against a co-
defendant.

Where a defendant claims to be entitled to contribution or indemnity against any other defendant to the action, a notice may be issued and the same procedure adopted, for the determination of such question between the defendants, as would be issued and taken against such other defendant if he were simply a third party, but this is not to prejudice the rights of the plaintiff against any defendant (*w*). In this case no leave of the Court is necessary for the issuing of the third-party notice (*x*).

Instance of
third-party
procedure.

For third-party procedure to apply it is always necessary to show a contract express or implied to contribute or indemnify, or a right to contribution on equitable principles (*y*). The most simple instance of the practice is to be found in an action against one of several sureties, who, if liable, will of course require contribution from his co-sureties. It may be noticed that third-party procedure does not apply to proceedings commenced by originating summons (*z*).

Death, &c.,
of parties.

If in the course of an action one of the parties dies or becomes bankrupt, or if in any way any devolution of the estate or title of any party to the action occurs *pendente lite*, the action does not abate, but an order

(*t*) *Edison v. Holland*, 41 Ch. D. 28; 58 L. J. Ch. 524; 61 L. T. 32.

(*u*) *Eden v. Weardale & Co.*, 28 Ch. D. 333; 54 L. J. Ch. 384; 33 W. R. 241.

(*v*) *Borough v. James*, W. N. (1884), 32.

(*w*) Order XVI. r. 55.

(*x*) *Towse v. Loveridge*, 25 Ch. D. 76; 32 W. R. 151.

(*y*) *Birmingham Land Co. v. London and North-Western Railway*, 34 Ch. D. 261; 56 L. J. Ch. 956; 55 L. T. 699; *Pontifex v. Foord*, 12 Q. B. D. 152; 53 L. J. Q. B. 321; 32 W. R. 316; *Spiller v. Bristol Nav. Co.*, 13 Q. B. D. 96; 53 L. J. Q. B. 322; 32 W. R. 670.

(*z*) *Re Wilson, Att.-Gen. v. Woodhall*, 45 Ch. D. 266; 60 L. J. Ch. 101. 63 T. T. 100

may, if necessary, be made *ex parte* for the personal representative, trustee, or other successor in interest (if any) to be made a party to the action or to be served with notice thereof, and such order as may be just may be made for disposal of the action (a). On service of any such order the new party must enter an appearance within the same time and in the same manner as if served with a writ of summons; but he may apply within twelve days of service to discharge or vary any such order, and if a person is under disability and has no guardian *ad litem*, the application may be within twelve days from the appointment of a guardian *ad litem*, and in any such case the order does not have any effect against such person until after the expiration of such period of twelve days (b). If on the death of a party to an action the person entitled to proceed fails to do so, any other party, including the person against whom the action may be continued, may take out a summons to compel him to proceed, or in default judgment may be entered for the party so applying (c). With regard to an infant born during action, the common order making him a party will not bind him as to proceedings before he was a party, but the Court can make a special order which will have that effect, and a supplemental action is not necessary (d).

The fact of any such change of interest as is referred to in the last paragraph, has to be certified to the proper officer by the solicitor for the plaintiff or person having the conduct of the proceedings, and such officer

Certifying
change of
interest.

(a) Order xvii. r. 1-4. In the case of the death of a party, it is not absolutely necessary to proceed as above, for, if the cause of action survives, a fresh writ may be issued. In a recent case a writ was issued, but before service defendant died. Within a year from probate a fresh writ was issued against the executors, but in the meantime the period of statutory limitation (21 Jac. 1, c. 16) had expired. Held, that the executors could not rely on the statute. (*Swindell v. Bulkeley*, 18 Q. B. D. 250.)

(b) Order xvii. rr. 6, 7.

(c) Order xvii. r. 8.

(d) *Peter v. Thomas-Peter*, 26 Ch. D. 181; 53 L. J. C. 514.

makes an entry thereof in the Cause Book which is kept at the offices, and when it has stood so marked for one year, it is at the end of that period struck out of the Cause Book (*e*).

Proceeding
without per-
sonal repre-
sentative of
deceased party.

If in any cause, matter, or other proceeding it appears to the Court or a Judge that any deceased person who was interested in the matter in question has no legal personal representative, the Court or Judge may proceed in the absence of any person representing his estate, or may appoint some person to represent his estate for all purposes of the proceedings, on such notice to such person (if any) as the Court or a Judge shall think fit, either specially, or generally by public advertisement, and the order so made and any order consequent thereon binds the estate of the deceased person in the same manner in every respect as if a duly constituted legal personal representative of the deceased had been a party (*f*).

Uniting
several causes
of action in
one writ.

Different causes of action existing in the same person or persons may be joined in the same action, but if it appears to the Court or a Judge that they cannot be conveniently tried together, separate trials may be ordered, and any defendant may apply, alleging that such causes of action cannot be conveniently disposed of together, and the Court or a Judge may order any of such causes to be excluded (*g*).

Ejectment.

Except, however, by special leave, an action for recovery of land cannot be joined with any other cause of action except in respect of mesne profits, or arrears of rent, or double value, in respect of the premises claimed any part thereof, and damages for breach of any contract under which the same or any part thereof are held (*h*). Nor, except by like leave, can claims by a

Trustee in
bankruptcy.

(*e*) Order XVII. rr. 9, 10.

(*f*) Order XVI. r. 46.

(*g*) Order XVIII. rr. 1, 8, 9.

(*h*) Ibid. r. 2. *Hambling v. Wallani*, W. N. (1889), p. 133; Law Students' Journal, Aug. 1889, p. 183. This rule provides, however,

trustee in bankruptcy as such be joined with any claim by him in any other capacity (*i*). And claims by or against an executor or administrator as such may only be joined with claims by or against him personally when such last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator (*j*). Executors and administrators.

Claims by plaintiffs jointly may be joined with claims by them, or any of them, separately against the same defendants (*k*), and claims by or against husband and wife may be joined with claims by or against either of them separately (*l*). Joint and separate claims.

Infants must sue by next friend (*m*) and defend by guardian *ad litem* (*n*). A married woman may now sue and be sued as provided by the Married Women's Property Act, 1882 (*o*), that is to say, as if a *feme sole* (*p*); an unconditional judgment cannot, however, be entered up against her, but the judgment is limited to her separate estate (*q*), unless, indeed, the judgment is in respect of an ante-nuptial debt, when it is otherwise (*qq*). Lunatics and persons of unsound mind sue Persons not sui juris suing or being sued.
Married women.
Lunatics.

that an action for foreclosure or redemption shall not be deemed an action for recovery of land within the meaning of the above provision, so as to prevent a claim for delivery of possession being joined.

(*i*) Order xviii. r. 3.

(*j*) Ibid. r. 5.

(*k*) Ibid. r. 6.

(*l*) Ibid. r. 4.

(*m*) Order xvi. r. 16.

(*n*) Order xvi. r. 18.

(*o*) Ibid. r. 16. And this even though the cause of action accrued before 1 Jan. 1883 (*Weldon v. Winslow*, 13 Q. B. D. 784; 53 L. J. Q. B. 528).

(*p*) 45 & 46 Vict. c. 75, s. 1. And even though she possesses no separate estate she cannot be compelled to find security for costs (*Jacob v. Isaac*, W. N. (1885), 168).

(*q*) *Bursill v. Tanner*, 13 Q. B. D. 691; *Perks v. Mylrea*, W. N. (1884), 64; 19 L. J. (N.) 172; *Pelton v. Harrison* (1891) 2 Q. B. 422; 60 L. J. Q. B. 742; 65 L. T. 514; *Scott v. Morley*, 20 Q. B. D. 120; 57 L. J. Q. B. 43; 57 L. T. 919. See as to form of Judgment against a Married Woman, Annual Practice (1897), 1240, 1241. See also Married Women's Property Act, 1893 (56 & 57 Vict. c. 63) and particularly sect. 2, under which costs may be ordered to be paid out of property which is subject to restraint on anticipation; also thereon *Hood-Barrs v. Heriot*, Law Journal Notes of Cases, 20th March, 1897; Law Students' Journal, 1897.

(*qq*) *Robinson v. Lynes* (1894), 2 Q. B. 577; 63 L. J. Q. B. 759; 71 L. T. 249.

Next friend
liable for costs
but not
guardian.

by their committee or by next friend, and defend by their committee or guardian appointed for that purpose (*r*). In practice a next friend or guardian *ad litem* is usually some person closely connected with the plaintiff or defendant, but there is no rule that this must be so. A married woman cannot act in either capacity (*s*). The next friend of a plaintiff is liable for the due prosecution of the action and for the costs of it, and he therefore has to sign a consent expressing his willingness to act as next friend, which consent is filed with the writ (*t*). The guardian of a defendant incurs no such liability for the costs of defending. No order is necessary for the appointment of such guardian, but on an affidavit of his fitness, that he has no adverse interest, and verifying his consent, the appearance is received (*u*).

Corporations,
companies, &c.

A Corporation sues and is sued in its corporate name, and the solicitor by whom it defends should be appointed under its common seal. Railway companies and joint stock companies also sue and are sued in their corporate names. Certain banking and other companies, however, by virtue of various statutes, sue and are sued in the name of one of their public officers (*v*).

Matters of a
public nature.

Actions comprising matters of a public nature must be commenced in the name of the Attorney-General, the person at whose instance they are commenced, and who for all practical purposes is the plaintiff, being called the relator. Such relator is liable for the costs, and therefore a written authority to the solicitor to act, has to be signed by him and filed on issuing the writ (*w*).

Relator.

(*r*) Order xvi. r. 17.

(*s*) *Thynne v. St. Maur*, 34 Ch. D. 465; 35 W. R. 273.

(*t*) Order xvi. r. 20.

(*u*) *Ibid.* r. 18. See form of Affidavit, No. 8 in Appendix A., Part II. of Rules of 1883. Annual Practice (1897), vol. ii. 13.

(*v*) See hereon, Arch. Pr. 14th ed. 1050 *et seq.* (*w*) Order xvi. r. 20.

A person is admitted to sue or defend as a pauper ^{Suing in form & provided he makes an affidavit that he is not worth £25—his wearing apparel and the subject-matter of the action only excepted—and that he obtains an opinion from counsel on a case laid before him that he has reasonable grounds for proceeding. The truth of the case sent to counsel has to be verified by the affidavit of the party or his solicitor. When a person is admitted to sue or defend as a pauper he is not liable to pay any Court fees, and nothing whatever must be received by his solicitor or counsel, and if they receive anything they will be guilty of contempt of Court and the pauper paying or agreeing to pay anything will be forthwith dispaupered. The Court will, if necessary, assign to the pauper both counsel and solicitor, who are not at liberty to refuse to render assistance, except on satisfying the Court of good reason for such refusal. All proceedings taken for the pauper must be signed by the solicitor, whose duty it is to take care that nothing is done without good cause. Costs ordered to be paid to a person admitted to sue or defend as a pauper are, unless the Court or a Judge otherwise direct, to be taxed as in other cases (*x*), that is to say, upon the same principle as costs are taxed in other cases. This rule no doubt applies to an action tried before a Judge alone, in which case the awarding of costs is a matter in the Court's discretion, but it appears not to apply to an action tried before a Judge and jury, and in such a case if the pauper succeeds he only gets costs on the pauper scale, that is, costs out of pocket and witnesses, but nothing else (*y*).}

^{pauperis.}

^{What costs allowed to paupers.}

Although it is usual in practice to give notice to a defendant before bringing an action against him, it is not generally necessary. Until lately, however, there was one prominent instance in which such notice must

^{As to notice before action.}

(*x*) Order xvi. rr. 22-31.

(*y*) *Carson v. Pickersgill*, 14 Q. B. D. 859; 54 L. J. Q. B. 484; 52 L. T. 950; Annual Practice (1897), 412, 413

Demand on
constable for
warrant.

have been given—viz., in an action against a justice of the peace for anything done by him in the execution of his office, in which case a month's notice prior to the action was required (z). But this is no longer so since the Public Authorities Protection Act, 1893 (zz), which repeals so much of any public statute as enacts that in any proceeding to which that Act applies notice of action is to be given. However, this Act does not alter the fact that when any action is intended to be brought against a constable who has acted under a warrant, a demand in writing must be made for the perusal and a copy of the warrant six days before commencing the action against him. If this is granted within the time, the justice who granted the warrant must be joined as a co-defendant, and then the mere production of the warrant at the trial will entitle the constable to a verdict, though if the justice had no jurisdiction the plaintiff will recover against him; if not granted within the six days, the action may then be commenced against the constable alone (a).

The Vexatious
Actions Act,
1896.

By the Vexatious Actions Act, 1896 (b), it is provided that if any person has persistently instituted legal proceedings without reasonable grounds, the Court may, on the application of the Attorney-General, order that no further legal proceedings shall be instituted by such person without leave of the Court or a Judge, who must be satisfied that the legal proceeding is not an abuse of the process of the Court, and that there is *prima facie* ground for such proceeding (c).

(z) 11 & 12 Vict. c. 44, s. 9.

(zz) 56 & 57 Vict. c. 61, s. 2. This Act came into force Jan. 1, 1894, and contains various provisions with regard to Public Authorities, and repeals a number of previously existing statutes.

(a) 24 Geo. II., c. 44, s. 6.

(b) 59 & 60 Vict. c. 51.

(c) See *Re Chaffers*, 41 Solicitors' Journal, 228; Law Students' Journal, March 1897, p. 49.

PART II.

OF THE PRACTICE AS SPECIALLY OCCURRING IN THE QUEEN'S BENCH DIVISION.

CHAPTER I.

PROCEEDINGS TO APPEARANCE.

PROCEEDINGS are commenced by an action (*a*), which An action. is defined as the means of recovering in a Court of Justice what is due and owing to oneself (*b*). The first step in an action is a writ of summons (*c*), which Writ of summons. may be issued in London, or (except in Probate cases) in a District Registry (*d*). This writ is tested in the name of the Lord Chancellor, or if that office is vacant, in the name of the Lord Chief Justice of England, and bears date on the day it is issued (*e*), and it specifies the Division to which it is intended that the action should be assigned (*f*). It states the plaintiff's and defendant's names, and summonses the defendant to appear. If the writ is issued from a District Registry, and the defendant neither resides nor carries on business within the District, there must be a statement on the face of the writ that he has the option of appearing in the District Registry or at the Central Office, and if he does reside or carry on business within such District,

(*a*) Order i. r. 1.

(*b*) Brown's Law Dictionary, 2nd ed. p. 11, tit. "Action."

(*c*) Order ii. r. 1. See forms in Appendix II. hereto, post, pp. 300, 301.

(*d*) Order v. r. 1.

(*e*) Order ii. r. 8.

(*f*) Order v. r. 5.

Indorsements of claim.	then the statement must be that the defendant must appear in the District Registry (<i>g</i>). Every writ is endorsed with short particulars of the plaintiff's claim, so as to show the defendant at once the nature of the demand made against him, and in proper cases with the special indorsement presently mentioned (<i>h</i>). The
Of address of plaintiff.	address (<i>i</i>) of the plaintiff and the name and address of the solicitor issuing the writ must also be indorsed, and if he is an agent, then the two names must be indorsed. There must also be indorsed an
Of address for service.	address for service, which if the writ is issued from London must be within three miles of the principal entrance of the Central Hall at the Royal Courts of Justice; and if from a District Registry, within the jurisdiction of such registry; and if defendant does not reside within the registry, then in addition an address within three miles of the principal entrance of the
When plaintiff sues in person.	Central Hall at the Royal Courts of Justice. If the plaintiff sues in person, then he must indorse upon the writ his place of residence and occupation, and if that is more than three miles from the principal entrance of the Central Hall at the Royal Courts of Justice, then also an address for service within that distance; and if the writ is issued from a District Registry, and he resides beyond it, then an address for service within the registry, and when the defendant does not reside within the registry, then, in addition, an address within three miles of the principal entrance of the Central
Representative capacity.	Hall at the Royal Courts of Justice (<i>k</i>). If the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, the indorsement must show in what capacity the plaintiff or defendant
Liquidated demand.	sues or is sued (<i>l</i>). If the writ is for a debt or liquidated demand only, the amount claimed for debt

(*g*) Order v. rr. 3, 4.

(*h*) Order III. rr. 1-3.

(*i*) The address must be his place of residence and not merely his place of business, unless in the case of a firm, when the business address is sufficient. (*Stoy v. Rees*, 24 Q. B. D. 748; 59 L. J. Q. B. 310; 63 L. T. 49.)

(*k*) Order IV.

(*l*) Order III. r. 4.

and costs respectively must be indorsed, and also a notice that upon payment thereof within four days after the service (or in the case of a writ not for service within the jurisdiction within the time allowed for appearance), further proceedings will be stayed. If defendant does so pay, he is nevertheless entitled to have the costs he pays taxed, and if more than one-sixth is disallowed, the plaintiff's solicitor pays the costs of taxation (*m*). After service the person serving the writ must within three days indorse on it the day of the month and week of the service thereof, otherwise the plaintiff cannot on non-appearance of the defendant, except by special leave (*n*), proceed to judgment by default as detailed in the next chapter, as every affidavit of service of the writ must mention the day on which this indorsement was made; and this rule applies not only where personal service has been effected, but also to a case of substituted service (*o*). In Appendix II. will be found the form of a writ of summons. After service.

If the plaintiff seeks only to recover a debt or liquidated demand in money, arising (A) upon a contract express or implied, or (B) on a bond or contract under seal, or (C) on a statute for some fixed sum other than a penalty, or (D) on a guarantee where the claim against the principal is a fixed sum, or (E) on a trust (*p*), and also (F) in actions for recovery of land (with or without a claim for mesne profits) by a landlord against his tenant whose term has expired, or been duly determined by notice to quit, the writ may Special
indorsement
under Order
III. r. 6.

(*m*) Order III. r. 7.

(*n*) *Shepherd v. Silcock*, W. N. (1886), 84; Law Students' Journal (1886), 111.

(*o*) Ord. r IX. r. 15.

(*p*) Thus, testator's estate is given to trustees upon trust to realise and pay thereout to A £1000, &c. &c. Here A, instead of suing for administration, might issue a writ in the Queen's Bench Division specially indorsed to recover £1000. He might also add a claim for interest at 4 per cent. per annum from the end of a year from testator's death. (*Hamilton v. Brogdon*, 60 L. J. Ch. 88.)

at the option of the plaintiff be specially indorsed with a statement of his claim, or of the remedy or relief which he claims to be entitled to (*q*). It should be noticed that case (*r*) is very limited in only applying to cases of landlord and tenant (*r*), and also only after the regular expiration of the term, or after notice to quit (*s*); and it has been held that it does not apply in the case of a claim by a landlord to enforce a forfeiture clause in a lease, notwithstanding that the form of such clause is that upon the breach occurring the lessor may forthwith determine the term by notice to quit, and that the notice to quit has been given in accordance with the terms of the clause (*ss*). It has also been held only to apply to an action brought by a landlord who has himself granted the lease, or to whom the tenant has attorned by paying rent (*t*). The advantages of this special indorsement are two—viz., (1) if the defendant appears the plaintiff may apply for leave to sign judgment, notwithstanding the appearance, under Order XIV. (*u*); and (2) no further statement of claim is required, or indeed allowed to be delivered, but the indorsement on the writ is to be deemed sufficient (*v*). These points will presently be further noticed. It will be observed that this Rule says that the writ must be indorsed, *only* with a claim of the nature specified, so that if anything else is joined it is not a good special indorsement. Thus a writ is not properly specially indorsed when the indorsement claims to recover money owing on a mortgage and also asks for foreclosure (*w*). Nor can a claim for interest

Advantages of
special
indorsement.

As to claiming
interest in
special
indorsement.

(*q*) Order III. r. 6. See form of writ in such a case in Appendix II. hereto, post, p. 301.

(*r*) See hereon *Daubuz v. Lavington*, 13 Q. B. D. 347; 53 L. J. Q. B. 283; 32 W. R. 772; *Mumford v. Collier*, 254 Q. B. D. 279; 59 L. J. Q. B. 552; 38 W. R. 716.

(*s*) *Burns v. Walford*, W. N. (1884), 31; 19 L. J. (N.) 108; *Mansergh v. Rimell*, W. N. (1884), 34; 19 L. J. (N.) 110.

(*ss*) *Arden v. Boyce* (1894), 1 Q. B. 796; 63 L. J. Q. B. 338; 70 L. T. 480.

(*t*) *Casey v. Hellyer*, 17 Q. B. D. 97; 34 W. R. 337.

(*u*) Post, p. 66.

(*v*) Post, p. 75.

(*w*) *Imbert-Terry v. Carver*, 34 Ch. D. 506; 35 W. R. 328.

be properly included in a special indorsement unless claimed under a contract which is duly alleged (*x*), or unless the action is on bill, note, or cheque, when interest is given as liquidated damages under the provisions of the Bills of Exchange Act, 1882 (*y*). However, if a claim is thus united which spoils the special indorsement amendment may be allowed (*z*), and the difficulties which often presented themselves on the point have now been practically removed, it being provided that on an application under Order XIV., matters which ought not to have been included in the indorsement may be struck out, or the Judge may deal with the claim specially indorsed as if no other claim had been included, and allow the action to proceed as respects the residue of the claim (*a*).

Provision of
Supreme
Court Rules,
Nov. 1893.

The writ having been issued, the next step is to effect service of it. In some cases the defendant's solicitor will accept service and undertake to appear, which is sufficient (*b*), and if having done this he does not then appear he is liable to attachment; but more usually actual service has to be effected. When practicable this service is personal, by delivering to the defendant a copy of the writ, and at the same time producing to him the original (*c*), and it has been held that delivery of a copy of a writ in an envelope, without informing the defendant what it is, is not good service (*cc*). If it is made to appear to the Court or a Judge, by affidavit, that personal service cannot be promptly

Service of
writ.

(*x*) *Ryley v. Master* (1892), 1 Q. B. 674; 61 L. J. Q. B. 219; 60 L. T. 228; *Sheba Gold Mining Co. v. Trubshaw*, *ibid*; *Wilks v. Wood* (1892), 1 Q. B. 684; 61 L. J. Q. B. 516; 66 L. T. 520.

(*y*) *London and Universal Bank, Ltd. v. Clancarty* (1892), 1 Q. B. 689; 61 L. J. Q. B. 225; 66 L. T. 798.

(*z*) *Paxton v. Baird* (1893), 1 Q. B. 139; 62 L. J. Q. B. 176; 67 L. T. 623.

(*a*) See Order xiv. r. 1 (*b*) being an addition to the original Order xiv. r. 1 made by S. C. Rule of Nov. 1893. See Annual Practice (1897), 337.

(*b*) Order ix. r. 1; Order xii. r. 19.

(*c*) Strictly speaking, the original need not be produced unless asked for by defendant. The practice is invariably as above stated.

(*cc*) *Banque Russe et Française v. Clark*, W. N. (1894) 203. Law Students' Journal (1895), 5.

effected, an order for substituted or other service may be made—*e.g.*, on some person connected with defendant, or by sending the copy writ through the post, or by advertisement, &c. (*d*).

Service on particular persons and bodies.

Infant.

Lunatic.

Corporation.

Hundred.

Railway companies.

Registered companies.

When husband and wife are both defendants, it is necessary to serve them both unless otherwise ordered (*e*). Where the defendant is an infant, the writ is served on his father or guardian, or if none, on the person with whom or under whose care he resides, unless otherwise ordered; but service on the infant may be ordered to be good service (*f*). Where the defendant is a lunatic or a person of unsound mind, the writ is served on his committee or person with whom he resides, or under whose care he is, unless otherwise ordered (*g*). If the defendant is a corporation aggregate (*h*), the writ is served on the mayor or other head officer, or on the town clerk, clerk, treasurer, or secretary. Every writ against the inhabitants of a hundred is served on the High Constable, or, if none, on any other chief acting officer of the police, and if it is against the inhabitants of any county of any city or town, &c., not being part of a hundred or other like district, it is served on some peace officer thereof (*i*). Railway and other similar companies may be served by the writ being left at or transmitted through the post to the principal office of the company or one of their principal offices where there shall be more than one, or by being given personally to the secretary, or if no secretary, to a director of the company (*j*). Companies registered under the Companies Act, 1862 (*k*),

(*d*) Order ix. r. 2; Order x.

(*e*) Order ix. r. 3.

(*f*) Order ix. r. 4. As to the course to be taken on the non-appearance of an infant or person of unsound mind so served, see post, p. 65.

(*g*) Ibid. r. 5.

(*h*) This includes a Corporation incorporated by foreign statute (*Haggin v. Comptoir, &c.*, 23 Q. B. D. 519).

(*i*) Order ix. r. 8.

(*j*) 8 & 9 Vict. c. 16, s. 135; Arch. Pr. 1068.

(*k*) 25 & 26 Vict. c. 89.

may be served by leaving the writ, or sending it through the post in a prepaid letter addressed to the company, at their registered office (*l*).

There are special provisions as to the suing and service of partners, or of a person carrying on business in the name of a firm, which call for particular notice.

Suing and service of partners.

The old practice, before the Judicature Acts, was that on suing a partnership firm the plaintiff must find out who were the members of the firm, and name them and serve them individually as defendants, in the same way that when partners were suing they had to be individually named. Now, however, two or more persons, claiming or being liable as partners and carrying on business within the jurisdiction, may sue and be sued in the name of their partnership firm, and any party to an action may in such case apply by summons for a statement of the names and addresses of the persons who were at the time of the accrual of the cause of action partners in any such firm, to be furnished in such manner and verified on oath or otherwise as the Judge may direct (*m*). A person trading by himself as a firm, or in an assumed or trading name, must sue in his own name though he may be sued in his trading name (*n*). When partners are sued in their firm's name, if one of them is an infant his infancy cannot be set up as a bar, but the infancy, if proved, may be a good reason for inserting in the judgment a stay of execution as against the infant partner's share of the partnership assets (*o*). The words "carrying on business" do not include an agency, even though the name of the firm be painted on the doors of the office of the

Summons for particulars of names and addresses.

(*l*) 25 & 26 Vict. c. 89, s. 62. Order ix. r. 8. *White v. Land and Water Co.*, W. N. (1883), 74.

(*m*) Order XLVIIIa. r. 1.

(*n*) *Mason v. Mogridge*, 8 Times Law Reports, 805.

(*o*) *Lovell v. Beauchamp*, (1894) A. C. 607; 63 L. J. Q. B. 802; 71 L. T. 587.

Demand for
names of
partners.

agency (*p*) ; but a foreign firm having a branch business within the jurisdiction and a partner resident here, may be sued in the High Court in their partnership name (*q*). Where a writ is issued in which the plaintiffs are suing under a firm name, the defendant may demand in writing the names and places of residence of the person or persons constituting the firm, and all proceedings may, on application, be stayed till furnished. When the names are so declared the action proceeds in the same manner, and the same consequences follow, as if they had been named as the plaintiffs in the writ, but all the proceedings continue in the name of the firm (*r*).

Service when
persons sued
as partners.

When persons are sued as partners in the name of their firm, the writ is served upon any one or more of the partners, or at the principal place of business within the jurisdiction upon any person having at the time the control or management of the business there, and this even though some of the partners are out of the jurisdiction. It is, however, provided that if a partnership has been dissolved to the knowledge of the plaintiff before the commencement of the action, the writ of summons shall be served upon every person within the jurisdiction sought to be made liable (*s*).

When served
on manager
notice also
must be served.

If the writ is served not upon a partner but upon a person managing or having control of the business, a notice in writing must also be served upon him at the same time, stating that he is served in that capacity, otherwise he shall be deemed to be served as a partner (*t*).

Service in case
of vacant pos-
session of land.

In the case of an action to recover land, if the

(*p*) *Grant v. Anderson*, (1892) 1 Q. B. 108.

(*q*) *Shepherd v. Hirsch*, 45 Ch. D. 231 ; 59 L. J. Ch. 819 ; 63 L. T. 335 ; *Lysaght v. Clark*, (1891) 1 Q. B. 552 ; 64 L. T. 776.

(*r*) Order XLVIII. r. 2.

(*s*) *Ibid.* r. 3.

(*t*) *Ibid.* r. 4. As to the appearance of parties sued as partners, see post, pp. 57, 58, and as to execution when writ issued in this way, see post, p. 168.

possession is vacant, and service cannot be effected otherwise, it may be made by posting a copy of the writ upon the door of the dwelling-house or other conspicuous part of the property (*u*), but on such service judgment by default can only be obtained under an order which is obtained on *ex parte* application to a Master in Chambers, supported by affidavit showing that the premises are vacant, that personal service cannot be effected, and that a copy of the writ has been thus posted (*v*).

If a defendant has reason to believe that though a solicitor's name appears on a writ as issuing it, yet his name has been used without his authority, he may serve such a solicitor with a demand for him to state forthwith in writing whether it has been issued by him, or with his authority or privity, and, if he answers in the negative, then all proceedings are stayed and nothing further is allowed to be done without leave (*w*). A party may change his solicitor at any time during an action by simply filing and serving a notice of such change, but until this is done the former solicitor is considered the solicitor of the party, until the final conclusion of the cause or matter whether in the High Court or Court of Appeal (*x*).

Demand whether writ issued by solicitor's authority.

Change of solicitors.

When a defendant is residing out of the jurisdiction no writ of summons can be issued against him without leave of the Court or a Judge (*y*), which may be obtained whenever—

When writ may be issued against defendant out of jurisdiction.

(a) The whole subject-matter of the action is land

(*u*) Order ix. r. 9.

(*v*) Annual Practice, (1897) 269.

(*w*) Order vii. r. 1.

(*x*) Ibid. r. 3. If it is an action in the Chancery Division, then in addition a copy of the notice has to be left in the chambers of the Judge to whose court the cause is attached.

(*y*) Order xi. r. 1.

situate within the jurisdiction (with or without rents or profits); or

- (b) Any act, deed, will, contract, obligation, or liability affecting land or hereditaments situate within the jurisdiction, is sought to be construed, rectified, set aside, or enforced in the action; or
- (c) Any relief is sought against any person domiciled or ordinarily resident within the jurisdiction; or
- (d) The action is for the administration of the personal estate of any deceased person, who at the time of his death was domiciled within the jurisdiction, or for the execution (as to property situate within the jurisdiction) of the trusts of any written instrument, of which the person to be served is a trustee, which ought to be executed according to the law of England; or
- (e) The action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which is to be performed within the jurisdiction, *unless the defendant is domiciled or ordinarily resident in Scotland or Ireland (a)*; or
- (f) Any injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages

(a) The words italicised should be specially noticed. The effect is that when the defendant is domiciled or ordinarily resident in Scotland or Ireland, leave can never be obtained to sue here. *Lenders v. Anderson*, 12 Q. B. D. 50; 53 L. J. Q. B. 104; 32 W. R. 230; *Agnew v. Usher*, 12 Q. B. D. 78; 51 L. T. 752.

are or are not also sought in respect thereof ; or

- (g) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction (b).

As regards case (g), the proper course is to issue the writ without leave, and to serve the defendant within the jurisdiction, and then apply for a concurrent writ for service out of the jurisdiction on an affidavit showing that the defendant out of the jurisdiction is a necessary or proper party to the action, and that the other defendant has been duly served (c). Neither a Master nor a District Registrar can give leave for service of a writ or notice thereof out of the jurisdiction (d). When in any of these cases the defendant is in Scotland or Ireland, and there is any Court there with concurrent jurisdiction, the Court is to have regard to the comparative cost and convenience of proceeding here or there, and particularly in the case of small demands, to the powers and jurisdiction of the Sheriffs Courts or Small Debts Courts in Scotland, and of the Civil Bill Courts in Ireland (dd).

Procedure when one defendant here and another abroad.

Leave given by Judge only.

Special circumstances to be considered when defendant in Scotland or Ireland.

An affidavit in support of an application to sue a defendant out of the jurisdiction must show : (1) that in the belief of the deponent the applicant has a right to the relief claimed ; (2) where the defendant is, or may probably be found ; (3) whether he is a British subject or not ; (4) the grounds on which the application is made ; and leave is not to be granted unless it shall be made sufficiently to appear to the Judge that the case is a proper one for service out of the juris-

Affidavit in support of application.

(b) Order XI. r. 1.

(c) *Collins v. North British and Mercantile Insurance Co.*, (1894) 3 Ch. 228 ; 63 L. J. Ch. 709 ; 71 L. T. 58.

(d) Order LIV. r. 12.

(dd) Order XI. r. 2.

diction (*e*). When an order is made it names the time for the defendant's appearance (*f*), which varies according to the distance from England of the place of the defendant's residence (*ff*); and if the defendant is neither a British subject, nor in British dominions, notice of the writ and not the writ itself, is served on him (*g*).

When service
may be
effected.

Service of a writ may be effected at any hour of the day or night, and on any day not being a Sunday or *dies non*, such as Christmas Day or Good Friday; a writ, however, only remains in force for twelve months; but where it has not been served it may, by leave, and before the expiration of the twelve months, be renewed for six months, and so on from time to time, on showing that reasonable efforts have been made to serve it, or for other good reason. This renewal is effected by the writ being marked at the proper office with a seal bearing the date of renewal (*h*).

How long
writ in force.

Loss of writ.

Where a writ has been lost, leave may be given for a correct copy to be sealed in lieu of the original writ (*i*).

Concurrent
writs.

Concurrent writs are sometimes issued (*j*). They are simply duplicate originals, and are usually issued for the sake of expedition—*e.g.*, where there are several defendants residing at different places (as each is entitled, as before mentioned (*k*), to see the original on service), or where it is doubtful where a defendant is

(*e*) Order xi. r. 4.

(*f*) Ibid. r. 5.

(*ff*) A table of the times has been settled by Regulation of 15th July, 1886, which is set out in Annual Practice, (1897) 1271.

(*g*) Order xi. r. 6.

(*h*) Order viii. rr. 1, 2. The only use of renewing a writ instead of issuing a fresh one is where the claim would, but for the process, be barred by the Statute of Limitation.

(*i*) Order viii. r. 3.

(*j*) Order vi.

(*k*) Ante, p. 47; and note (*c*).

residing or is to be found. A writ for service within the jurisdiction may be issued and marked as a concurrent writ with one for service out of the jurisdiction and *vice versa* (*l*), and this even although the original was in form for service only within the jurisdiction (*m*).

The Court or a Judge may, at any stage of the proceedings (*n*), allow the plaintiff to amend the indorsement on his writ of summons in such manner and on such terms as may seem just (*o*), and where the indorsement constitutes in fact the statement of claim, as is hereafter mentioned (*p*), the provision as to amendment of statement of claim without leave applies—a matter which is also dealt with hereafter (*q*). Amendment of writ.

Service having been effected, the next step in the action is for the defendant to take the technical step of entering an appearance to the writ, which appearance should be entered at the Central Office or the District Registry, as the case may be (*r*), within eight days from service, inclusive of the day of service, except in the case of writs issued against a defendant out of the jurisdiction, when the time is fixed by the Court or a Judge on the leave being granted to issue the writ, and as has been stated varies according to the distance of the defendant from England (*s*). By appearance is meant the mode in which the defendant brings himself before the Court, and it simply consists in the defendant in person, or by his solicitor, giving in at the proper office a memorandum in writing dated the day of its delivery, bearing the proper Court stamp, Appearance. Time for. What it is, and how entered.

(*l*) Order vi. r. 2.

(*m*) *Smallpage v. Tonge*, 17 Q. B. D. 644; 34 W. R. 768.

(*n*) Even after judgment pronounced if not drawn up. *Keith v. Butcher*, W. N. (1884), 37.

(*o*) Order xxviii. r. 1.

(*p*) *Post*, p. 75.

(*q*) *Post*, pp. 85, 86: Order xxviii. r. 2.

(*r*) *Ante*, p. 43, 44.

(*s*) Order xi. r. 5. See Regulation of different times allowed in Annual Practice, (1897) 1271.

What memorandum of appearance contains.

and signifying that he appears, and containing the name of the defendant's solicitor, or stating that the defendant defends in person. At the same time also there must be delivered to the officer a duplicate of the memorandum, which the officer seals with the official seal, showing the date on which it is sealed, and returns to the person entering the appearance, and the duplicate memorandum so sealed constitutes a certificate that the appearance was entered on the day indicated by the seal, and it is dealt with as presently mentioned (*t*). The memorandum of appearance, if the appearance is entered by a solicitor, must contain his place of business; and if entered in London, an address for service not more than three miles from the principal entrance of the Central Hall at the Royal Courts of Justice; and if entered in a District Registry, an address for service within the district, otherwise the memorandum is not to be received; and if any such address is illusory or fictitious, the appearance may be set aside on the application of the plaintiff (*u*). If the writ is issued in London, the appearance must be in London also; if it is issued from a District Registry, then, if the defendant resides or carries on business within the district, he must appear there, but if it is issued in the District Registry, and he does not so reside or carry on business, he can appear either in London, or in the District Registry, and in such case, or if when there are several defendants one appears in London, the action then proceeds in London, subject to this, that if the Court or a Judge is satisfied that the defendant appearing in London is a merely formal defendant, or has no substantial cause to interfere in the conduct of the action, such Court or Judge may order that the action may proceed in the District Registry, notwithstanding such appearance in London (*v*). The defendant should, as before stated, appear within

(*t*) Order xii. r. 8.
(*v*) Ibid. rr. 1, 4-7.

(*u*) Ibid. rr. 10, 11.

the eight days, for in default thereof the plaintiff may proceed to judgment, as mentioned in the next chapter; but if he does not appear within the eight days, he may still do so if the plaintiff has not yet signed judgment (*w*). An appearance by a defendant to the original writ stands as a good appearance to an amended writ (*ww*).

The defendant should also on the day on which he enters an appearance to a writ of summons, give notice of his appearance to the plaintiff's solicitor, or, if the plaintiff sues in person, to the plaintiff himself. The notice may be given either in writing served in the ordinary way at the address for service, or by prepaid letter directed to that address and posted on the day of entering appearance, in due course of post, and it must in either case be accompanied by the sealed duplicate memorandum before referred to (*x*).

Notice of appearance, &c.

Where a party after having sued or appeared in person has given notice in writing to the opposite party or his solicitor, through a solicitor, that such solicitor is authorised to act in the cause or matter on his behalf, all further proceedings are to be thereafter delivered to or served on such solicitor (*y*).

Party suing or appearing in person, and afterwards employing a solicitor.

Where persons are sued as partners in the name of their firm, they must appear individually in their own names; but all subsequent proceedings continue in the name of the firm (*z*). Where in such a case one person appears merely as being a partner in the firm

Appearance by partners sued in firm's name.

(*w*) Order XII. r. 22.

(*ww*) *Hammer v. Clifton*, 42 W. R. 287.

(*x*) Order XII. r. 9. But although the notice and sealed duplicate memorandum are not served, yet the appearance is not bad and judgment is not allowed to be signed. It is only an irregularity, and the plaintiff's course would be to take out a summons to strike out the appearance and for leave to sign judgment. This would be useless, as of course then the irregularity could be rectified.

(*y*) Order LXVII. r. 7.

(*z*) Order XLVIII. r. 5.

Appearance
under protest.

sued, judgment cannot be signed in default against the firm nor of course against him (a). Where a person is served as having the control or management of a business, no appearance by him individually is necessary unless he happens to be a member of the firm sued (b). If a person is served as a partner and he denies being one, he may enter an appearance under protest, denying that he is a partner (c). Such an appearance may be entered as of course without order or *fiat*, and the form of it runs: "Enter appearance for A.B., a person served as a partner, but who denies that he is a partner in the defendant firm of," &c. (cc).

Appearance
by person not
named in writ
of summons to
recover land.

Any person not named as a defendant in a writ of summons for the recovery of land, may by leave of the Court or a Judge appear and defend, on filing an affidavit showing that he is in possession of the land by himself or his tenant (d). Any person appearing to defend any such action as landlord in respect of property whereof he is in possession only by his tenant, must state in his appearance that he appears as landlord (e). If a defendant in appearing to an action for recovery of land only claims a title to some portion of the property which is sought to be recovered, he may, in his appearance, or in a notice signed by himself or his solicitor, to be served within four days after appearance, limit his defence to the part in respect of which he desires to defend (f).

Limiting
defence.

Things a
defendant may
do before
appearance.

Generally a defendant cannot take any step in an

(a) *Jackson v. Litchfield*, 8 Q. B. D. 474; 51 L. J. Q. B. 327.

(b) Order XLVIII. r. 6.

(c) *Ibid.* i. 7. As to partners suing or being sued in their firm name, see ante, p. 49, and as to execution when partners are so sued and judgment obtained, see post, p. 168.

(cc) Annual Practice, (1897) 892; notes to Order 48a, rule 7.

(d) Ord-r XII. rr. 25, 27. To prevent fraudulent recoveries of possession by collusion with the tenant of the land, it is provided by 15 & 16 Vict. c. 76, s. 209, that all tenants shall, on pain of forfeiting three years' rack rent of the premises, forthwith give notice to their landlords of any writ in ejectment delivered to them or coming to their knowledge.

(e) Order XII. r. 26.

(f) *Ibid.* rr. 28, 29.

action before appearance, but he may, however, without appearance apply to the Court to set aside service on him of the writ, or to discharge the order authorizing such service (*g*). This might occur where he contends that, being out of the jurisdiction of the Court, leave to issue the writ has been improperly obtained. A defendant may also pay money into Court before appearance (*h*), or apply for trial of the action in the County Court (*i*), or interplead (*k*).

Proceedings under the Bills of Exchange Act, 1855 (*l*), though they cannot now take place in the High Court, should still, however, be referred to. Under that Act, it was enacted that when a bill of exchange or promissory note (which words included cheques) was not more than six months overdue, a writ might be issued, the time to appear to which was to be twelve days, and which writ must be personally served on the defendant, who could not appear thereto as a matter of right, but only by obtaining leave to do so from a Judge within the twelve days limited for appearance, which leave would be granted on his paying into Court the sum indorsed upon the writ, or satisfying the Judge by affidavit that he had some good defence. This leave might be granted on such terms as to security or otherwise as to the Judge might seem fit (*m*). If the defendant obtained leave and duly appeared, the proceedings went on as in other actions.

The advantage of this Act at the time it was passed was great, for it prevented a defendant in such cases from unduly delaying the plaintiff. Under the practice then existing, any defendant by simply appearing could put it upon the plaintiff to proceed throughout all the different stages of the action, which was a great hardship upon a plaintiff where the defendant had no real

(*g*) Order XII. r. 30.

(*i*) See post, pp. 113, 114.

(*l*) 18 & 19 Vict. c. 67.

(*h*) See post, p. 97, 98.

(*k*) See post, pp. 121-125.

(*m*) Ibid. s. 2.

Proceedings :
under Bills of
Exchange Act,
1855.

Advantage of
the Act.

Reason of its
disuse.

its repeal.

defence. This was specially apparent in the case of actions on bills, notes and cheques—hence the Act. However, after the coming into operation of the Judicature Acts, by reason of the provisions of Order XIV. (*n*), there no longer remained any reason for the special procedure under the Bills of Exchange Act, and it was considered advisable that no more writs should be issued under it. It is therefore now provided that no writ shall be issued under the Bills of Exchange Act (*o*), and by the Statute Law Revision Act, 1883 (*p*), the Act is now repealed, though by reason of section 7 of that statute its provisions may still be taken advantage of in County and other inferior Courts.

To return, the defendant having appeared, the subject of pleadings must be considered, but first it will be advisable to deal with the subject of judgment in default of appearance, and applications under Order XIV., and this is done in the next chapter (*q*).

(*n*) See post, pp. 66, 67.

(*o*) Order II. r. 6.

(*p*) 46 & 47 Vict. c. 49.

(*q*) At the commencement of this chapter it was stated that proceedings are commenced by an action, which is strictly correct; but it is advisable here to notice the process of replevin, in which certain steps are taken prior to the action. Replevin is the re-delivery of goods wrongfully taken from a person, occurring usually in cases of wrongful distress. The *modus operandi* is for the person whose goods are wrongfully taken to apply in the first instance to the Registrar of the District County Court, and before him enter into a bond with sureties, which is called the replevin bond. If the person desires to commence his action in the High Court, the conditions of the bond are to commence the action within one week, and to prosecute the same with due effect, to prove before the Court that he had good ground for believing either that some question of title was involved, or that the rent or damage exceeded £20, and to return the goods if their return is ordered. If, however, the action is to be commenced in the County Court, the conditions of the bond are only to commence the action within one month, and to prosecute the same with due effect, and to return the goods if their return is ordered. On the bond being given the goods are returned to the person giving it (called the replevisor), and he commences the action, so that the defendant in the action is to a certain extent in the position of a plaintiff in an ordinary action (51 & 52 Vict. c. 43, ss. 134–136).

CHAPTER II.

JUDGMENT IN DEFAULT OF APPEARANCE, AND APPLICATIONS
UNDER ORDER XIV.

THE writ of summons, as has been stated in the last chapter, requires the defendant to enter an appearance within eight days from service. If the defendant does not obey this by appearing, the plaintiff's next step is to proceed on his default, but the courses he can take differ according to the nature of the writ issued, and therefore each must be considered separately.

First.—*The writ may have been indorsed for a liquidated demand, either specially or otherwise.* In this case, if the defendant does not appear within the eight days, the plaintiff may file an affidavit of service, and of the indorsement of the fact of the service on the writ within three days afterwards, and on this he may at once sign final judgment and issue execution; if there are several defendants, and some one or more only do not appear, he may sign final judgment and issue execution against the defendant or defendants not appearing, and proceed with his action against the other or others appearing. This judgment may be for any sum not exceeding the sum indorsed on the writ, with interest at the rate specified, or, if no rate specified, at the rate of five per cent. per annum to the date of judgment, and costs (a). Where after writ

Default of
appearance.

Non-appear-
ance to writ
for liquidated
amount.

Payment after
writ.

(a) Order xiii. rr. 2-4. In London cases where the amount recovered is over £50 the costs allowed are £4 14s., and in country cases £5 6s. Where the amount recovered is £20, but not exceeding £50, in London cases the costs allowed are £4, and in country cases £4 12s. If, however, the action is on a bill, note, or cheque, and the amount recovered is £20, but not exceeding £50, the costs allowed in London cases are £3 17s. 10d.,

issued the defendant pays part of the debt judgment must only be signed for the balance, and if signed for the original amount the defendant is entitled to have the judgment set aside; and if the whole debt is paid after issue of the writ the plaintiff is still entitled to sign judgment for the costs (*aa*).

Final and
interlocutory
judgment.

By a final judgment is meant one which is complete and requires no further act to be done to perfect it; an interlocutory judgment is one requiring something further.

Judgment by
default in
District
Registry.

When a defendant fails to appear to a writ issued out of a District Registry, and he had the option of appearing there or in London (*b*), judgment by default of appearance cannot be entered until after such time as a letter posted in London on the previous evening, in due time for delivery to the plaintiff on the following morning, ought in due course of post to have reached him (*c*).

Non-appear-
ance in actions
or unliqui-
dated damages.

Secondly.—*The writ may be, not for a debt or liquidated demand, but for detention of goods and pecuniary damages, or either of them.* Here, on non-appearance within the eight days, the plaintiff may, on affidavit of service, at once sign interlocutory judgment, and then issue a writ of inquiry with a view to final judgment; or instead of a writ of inquiry the damages may be ascertained in any way in which the Court or Judge may direct (*d*), *e.g.*, by referring the matter to one of the Masters; and in particular it is provided that if the question is one of an amount which is substantially a matter of calculation, it is not necessary to issue a writ of inquiry, but a reference to an officer of the

and in country cases £4 4s. In cases, however, in which substituted service of the writ is allowed £1 further is added to the above amounts, or if the amount recovered exceeds £50, the whole costs may at the option of the plaintiff be taxed. As to costs under Order XIV. see post, p. 67, note (*c*).

(*aa*) *Hughes v. Justin*, (1894) 1 Q. B. 667; 63 L. J. Q. B. 417; 70 L. T. 365.

(*b*) See ante, pp. 43, 44.

(*c*) Order XIII. 11.

(*d*) Ibid. r. 5.

Court is the proper course (e). In all cases in which damages are to be assessed in respect of any continuing cause of action, they are to be assessed, not merely down to the date of the issuing of the writ, but down to the time of the assessment (f). Date to which damages to be assessed.

In the case of a writ coming under this second head, where there are several defendants, some only of whom appear, the plaintiff may sign interlocutory judgment against those not appearing, and the damages or value of the goods may be assessed against them at the same time as the trial of the action against the other defendants, unless otherwise ordered (g). Several defendants.

Where the writ is indorsed so as partly to come under this second head and partly under the first, and any defendant fails to appear, the plaintiff may enter final judgment for the liquidated amount and costs, and interlocutory judgment for the residue, and may proceed as before detailed with regard to each separate part (h). Where writ indorsed for debt and for damages, &c.

A writ of inquiry is a writ issued to a sheriff after interlocutory judgment, commanding him to summon a jury and assess the amount of the damages. The under-sheriff usually presides at the assessment, and after the verdict is given the sheriff's return to the writ is made, and immediately thereafter on its production final judgment may be signed, unless the officer who presided certify that in his opinion judgment ought not to be entered until the defendant has had an opportunity to apply to the Court to set the finding aside and grant a new writ of inquiry (i). Notice of executing the writ of inquiry must be given to the defendant, or if he has appeared by solicitor, then to his solicitor, and the notice must be of the same length of time as an ordinary notice of trial (k). If it is intended to attend the inquiry by counsel, notice to Writ of inquiry.

(e) Order xxxvi. r. 57.

(g) Order xiii. r. 6.

(i) 1 Wm. IV., c. 7, s. 1; Order xli. r. 7.

(f) Order xxxvi. r. 58.

(h) Ibid. r. 7.

(k) Ten days.

that effect should also be given, otherwise the costs of counsel will not be allowed. At the hearing of the inquiry all the plaintiff has to prove, or the defendant is permitted to controvert, is the amount of the damages, for the cause of action is admitted (*l*).

Non-appearance in action to recover land,

Thirdly.—The writ may be for the recovery of land. Here if the defendant does not appear within the eight days, or appearing limits his defence to part only of the land (*m*), the plaintiff on affidavit, as in the other cases, may sign judgment for the land or the part thereof to which the defence does not apply (*n*); and where the plaintiff has in addition indorsed a claim for mesne profits (*o*), arrears of rent, double value or damages for breach of contract or for wrong or injury to the premises claimed, the plaintiff may as to them proceed as already pointed out in respect of money claims indorsed (*p*).

A claim for penalty on a bond.

Where an action is for a penalty on a bond (*q*), and the defendant does not appear, the proper course for the plaintiff to take is to assign breaches of the bond, by delivering a suggestion thereof to the defendant or his solicitor, and then issue a writ of inquiry before the sheriff to assess the damages (*r*).

Letting a defendant in to appear notwithstanding judgment,

In some cases a defendant may, by oversight or from some other reason, have omitted to appear to a writ within the proper time, and the plaintiff may have accordingly signed judgment. Notwithstanding this the Court or a Judge has power to set aside or vary such judgment upon such terms as may be just (*s*);

(*l*) Arch. Pr. 14th ed. 1331-1340. See also the provision of Order xxxvi. r. 56.

(*m*) See ante, p. 58.

(*n*) Order xiii. r. 8. The plaintiff cannot here sign judgment for his costs, the reason being that he might name as defendants persons who do not claim any interest, and who are not in possession (Arch. Pr. 1216.)

(*o*) Mesne profits are intermediate profits, that is, profits which have accrued between two given periods; Brown's Law Dictionary, 2nd ed. p. 343, tit. "Mesne."

(*p*) Order xiii. r. 9. Ante, pp. 59, 60.

(*q*) 8 & 9 Wm. III., c. 11, s. 8.

(*r*) 3 & 4 Wm. IV., c. 42, s. 16. Order xiii. r. 14.

(*s*) Order xiii. r. 10; Order xxvii. rule 15.

But this is a power only exercised in practice if the defendant can show a good defence on the merits, and it will usually be on the terms of his paying the costs of the judgment obtained against him by reason of his default, and other terms may be imposed upon him, as he is only let in to defend by the leniency of the Court (*ss*).

When a defendant who has not appeared is an infant, or person of unsound mind (*t*) not so found by inquisition, the plaintiff cannot sign judgment as in ordinary cases, but he must apply to the Court or a Judge that some proper person may be assigned guardian by whom such infant or person of unsound mind may defend the action. In support of such an application he must show that the writ was duly served, and that after the time for appearance, and at least six days before the hearing, notice of such application was served upon or left at the dwelling-house of the person with whom or under whose care such defendant was at the time the writ was served; and also, if an infant, served upon or left at the dwelling-house of the father or guardian of such infant, unless at the hearing of the application this latter point is dispensed with (*u*).

A judgment by default is dated as of the day on which the requisite documents are left with the proper officer for the purpose of the entry of the judgment, and the judgment takes effect as from that date (*v*).

Defendants often appear to actions, notwithstanding that they may not have any real defence, for the purpose of gaining time, or for other reasons. Under the old practice, before the Judicature Acts, this frequently worked great injustice to plaintiffs, for it was necessary

(*ss*) See note to Order xxvii. r. 15 in Annual Practice (1897), 590.

(*t*) As to the service of the writ in such case, see ante, p. 48.

(*u*) Order xiii. r. 1.

(*v*) Order xli. r. 4.

Order xiv.

Summons,
with affidavit
and any
exhibits must
be served four
days before
return.

to go on through all the steps in the action and ultimately have the action tried before judgment could be obtained. This is so, and necessarily so, still in actions for unliquidated demands, for there at any rate the question of amount may always be in dispute; but a very important practice is now allowed, chiefly in cases of liquidated demands (*w*). This is by proceeding under Order XIV., (*v*) by which it is provided that when a defendant appears to a writ of summons specially indorsed under Order III. rule 6 (*y*), the plaintiff may, on affidavit made by himself or any other person who can swear positively to the facts, verifying the cause of action (*z*) and the amount claimed (if any), and stating that in his belief there is no defence to the action, apply to the Judge for liberty to enter final judgment for the amount indorsed on the writ with interest (if any) or for the recovery of the land (with or without rent or mesne profits), as the case may be, and costs. This application is made by summons returnable not less than four clear days after service, and a copy of the affidavit on which it issues, and any exhibits thereto, must be served with it. On the return of the summons the Judge may, unless the defendant by affidavit, by his own *viva voce* evidence, or otherwise, shall satisfy him that he has a good defence to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend, or (except

(*w*) As to the former proceedings under the Bills of Exchange Act, 1855, see ante, p. 59. (*x*) Order xiv. r. 1.

(*y*) As to when a writ may be specially indorsed, see ante, pp. 45, 46. Observe that the joining of other matters that cannot properly be included in a special indorsement is not now fatal, but the other matter may be struck out, or the Judge or Master may proceed as if it had not been included, and may allow the action to proceed as respects the residue of the claim (Order xiv. r. 1, par. *b*; ante, pp. 46, 47).

(*z*) If the defendant is a married woman it was formerly necessary for the special indorsement to allege that she was and is possessed of separate estate, and for the affidavit in support of the summons to depose to this fact (*Southern Company's Bank v. Farguher*, 34 Solrs. Jour., 182; *Law Students' Journal*, Feb. 1890, p. 31); but this is no longer so, by reason of the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63, s. 1), in the case of contracts made since that Act.

in a claim for the recovery of land) shall offer to bring into Court the amount indorsed on the writ (*a*), make an order empowering the plaintiff to enter judgment accordingly notwithstanding the defendant's appearance. The Judge may, if he think fit, also order the defendant, or in the case of a corporation any officer thereof, to attend and be examined on oath, or to produce any leases, deeds, books, or documents, or copies of or extracts therefrom. The plaintiff then, if he obtains an order, signs judgment and taxes his costs (*b*). If, however, he recovers less than £20 he will get no costs without a special order; and if he recovers that amount, but not exceeding £50, he will only be entitled to such costs as he would have been entitled to if the action had been brought in the County Court, unless, indeed, he has obtained his order for judgment within twenty-one days of service of the writ, or within such further time as may be ordered by the High Court or a Judge thereof, when it is now provided that he shall be entitled to costs according to the scale for the time being in use in the Supreme Court (*c*). If it appears that, although there is a defence to part of the plaintiff's claim, to another part there is not, judgment may be forthwith given for the part to which there is no defence, and one defendant

Ordering
examination
of party.

Costs on judgment under
Order xiv.

(*a*) The Judge is not bound to give leave to defend merely because of an offer to pay into Court (*Crump v. Cavendish*, 5 Ex. D. 211).

(*b*) Order xiv. rr. 1-6.

(*c*) 51 & 52 Vict. c. 43, s. 116. This means that if the plaintiff recovers £20 or upwards, but not exceeding £50, and this not within twenty-one days or such further time as may be allowed, he only gets County Court costs, and that the costs will, as formerly, be a fixed sum without any taxation, viz., £6 10s. in a town and £7 in a country case, or if the action is on a bill, note, or cheque, not more than six months overdue, £3 17s. 10d. in a town case and £4 4s. in a country case, these having been settled as the proper amounts; but that if the order for judgment is obtained within the twenty-one days or such further time as may be allowed, then the costs are to be taxed in the ordinary manner. It has been held that if within twenty-one days the plaintiff recovers under Order xiv. a sum of £20 or upwards and then afterwards at the trial in the High Court or the County Court recovers a further amount, though the total is not exceeding £50, yet he gets High Court costs (*Barker v. Hemptead*, 23 Q. B. D. 8; 58 L. J. Q. B. 369; 60 L. T. 640). But this is not so where he recovers under Order xiv. less than £20 (*Wilson v. Statham* (1891) 2 Q. B. 261; 60 L. J. Q. B. 725). As to costs on judgments in default of appearance, see ante, p. 61, note (*a*).

Different courses Judge may take on hearing of summons.

may be allowed to defend, while judgment may be given against another (*d*). Practically on any application under Order XIV., the Judge may adopt one of three courses—viz., (1) He may order judgment; (2) He may refuse the application, giving to the defendant unconditional leave to defend; or (3) He may give defendant leave to defend on terms, such as paying money into Court. In addition to this it is provided that on a summons under Order XIV., with the consent of all parties, the action may be disposed of finally and without appeal in a summary manner (*e*). It may be noticed that as a general rule on a summons under Order XIV. the Masters do not receive affidavits in reply; they act simply on the plaintiff's affidavit filed in the first instance, and the defendant's affidavit in opposition; they have, however, a discretion on the point (*f*).

Appeals from decisions under Order xiv.

There is always an appeal on a summons under Order XIV. from a Master, or a District Registrar, to a Judge in Chambers. No appeal lies from an order of a Judge giving unconditional liberty to defend, but a further appeal does lie in other cases from the Judge to a Divisional Court, and from thence to the Court of Appeal (*ff*).

Order xiv. liable to abuses.

Order XIV. is much liable to be put to a wrong use, for plaintiffs not unfrequently apply under it when they ought not. It should, however, be observed that the costs of all such applications are to be dealt with on the hearing of the application, and the Judge may order by, and to whom, and when the costs shall be paid, or may refer them to the Judge at the trial. And it is specially provided that if a plaintiff applies under this Order where the case is not within it, or where, in the opinion of the Judge, he knew that the defendant relied on a contention that would entitle him to unconditional liberty to defend,

(*d*) Order xiv. rr. 4, 5.

(*e*) Ibid. r. 7.

(*f*) *Rotherham v. Priest*, 49 L. J. Q. B. 104.

(*ff*) 57 & 58 Vict. c. 16, s. 1.

the application shall be dismissed with costs, to be paid forthwith. If no order as to costs is made, and no trial subsequently takes place, the costs are costs in the cause (*g*). Furthermore, Order XIV. is often a failure, because the defendant succeeds in making out such a *prima facie* defence that the Judge feels bound to give liberty to defend. To meet such cases as this, however, and generally to facilitate the obtaining of a speedy determination of actions in which applications are made under Order XIV., it is now provided that where leave, conditional or unconditional, is given to defend, the Judge shall have power to give all directions as to the further conduct of the action, and may order the action to be forthwith set down for trial. It is also provided that a special list is to be kept for the trial of causes in which leave to defend has been given under this Order, and in which the Judge is of opinion that a prolonged trial will not be requisite, and the Judge may, if he thinks it advisable, order any such action to be put into such list (*h*). This power is somewhat extensively used, and appears to work well in practice.

Speedy trial may be ordered when leave to defend given.

Short cause list.

A party may, notwithstanding his appearance, at any time consent to judgment, but when a defendant has appeared by solicitor no order for entering judgment can be made by consent except through the solicitor (*i*); and when the defendant has appeared in person no such order can be made unless the defendant attends before a Judge and gives his consent in person, or unless his written consent is attested by a solicitor acting on his behalf, except in cases where the defendant is a barrister, conveyancer, special pleader, or solicitor (*j*).

Consents to judgment.

(*g*) Order XIV. r. 9. It has recently been held that if on the hearing of an Order XIV. summons the Judge makes the costs "costs in the cause," the Judge at the trial has no power to vary this order (*Koosen v. Rose*, Law Journal Notes of Cases, 13th March, 1897, p. 148; Law Students' Journal, April 1897).

(*h*) Ibid. r. 8.

(*i*) Order XXI. r. 2.

(*j*) Ibid. r. 10.

CHAPTER III.

PROCEEDINGS FROM APPEARANCE TO THE CLOSE OF
THE PLEADINGS.

The object of
pleadings.

Trial without
pleadings.

THE pleadings in an action consist of the statements of the plaintiff and defendant respectively, and have for their object the showing the Court and jury the questions in issue between the parties, and the facts on which they respectively rely. There are usually always pleadings in all actions which proceed to trial, but it is nevertheless now always open to a plaintiff to determine at the time of issuing his writ that he will endeavour to proceed to trial without pleadings (a). In this event the indorsement of the writ must contain a statement sufficient to give notice of the nature of his claim, or of the relief or remedy he requires, and must state that if the defendant appears the plaintiff intends to proceed to trial without pleadings, and then, if the defendant appears, the plaintiff must, within 10 days of such appearance, serve 21 days' notice of trial without pleadings. If the defendant, however, is not satisfied to have the action thus disposed of, he may, within the 10 days after appearance, apply by summons for delivery of a Statement of Claim, and the Judge may, if he thinks fit, make an order, in which case all the ordinary pleadings are delivered, or the Judge may refuse the application and direct that the action proceeds to trial without pleadings, in which case he may also, if he thinks fit, order that either party shall deliver

(a) Order xviii.

particulars of his claim or defence. If the Judge orders that the action is to proceed without pleadings, and makes no order as to particulars, all defences are to be open to the defendant at the trial, subject to this that where the defendant has not taken out a summons for delivery of a Statement of Claim, he cannot at the trial rely on a set-off or counter-claim, or on the defences of infancy, coverture, fraud, Statute of Limitations, or discharge under the Bankruptcy Acts, unless he has within 10 days after appearance given notice to the plaintiff stating the grounds and particulars upon which he relies. Where particulars are ordered to be delivered the parties are to be bound by such particulars so far as regards the matters in respect of which the order for particulars was made (*b*).

This new provision as to proceeding to trial without pleadings is but little used in practice, and it is, of course, just as necessary as ever to consider the subject of pleadings, and before doing so in detail it will be well to observe some points affecting them all generally. It has been before noticed (*c*) that under the practice prior to the Judicature Acts the pleadings were couched in technical language involving considerable repetition, and often, on account of this, running to considerable length. Pleadings, however, are now to be as brief as the nature of the case will admit of (*d*), and to state as concisely as may be the material facts on which the party pleading relies, but not the evidence by which they are to be proved, and must be divided into paragraphs numbered consecutively, each paragraph containing as nearly as may be a separate allegation, and dates, sums, and numbers must be expressed in figures and not in words (*e*). They must be printed, unless containing less than ten folios (*f*),

General points
as to pleadings.

To be brief.

Divided into
paragraphs.

When printed.

(*b*) Order XVIIIa.

(*d*) Order XIX. r. 2.

(*f*) A folio consists of seventy-two words, every figure being counted as a word (Order LXV. r. 27 (14).)

(*c*) Ante, p. 5.

(*e*) Ibid. r. 4.

Service.

when they may be either written or printed, or partly one and partly the other (*g*); and they are served by being delivered at the address for service, or if no appearance has been entered they are instead filed with the proper officer (*h*). Service of pleadings, notices, summonses, orders, or other proceedings in the course of an action must be effected before 6 P.M., and on Saturdays before 2 P.M., otherwise service will be deemed to have been effected on the following day, or in the case of Saturday on the following Monday (*i*), and no pleading can be delivered or amended during

Long Vacation. the Long Vacation except by order (*j*). Pleadings must be marked on the face with the date when delivered, and the reference to the action (*k*), the Division to which, and the Judge (if any) (*l*), to whom assigned, the title of the action (*m*), and the description of the pleading, and must be indorsed with the name and placo of business of the solicitor and agent, if any, or the name and address of the person delivering the same, if acting in person (*n*); and in a pleading denying any allegation in a previous pleading it must not do so evasively, but must answer the point in substance, and generally a fair and substantial answer must be given (*o*). It is not sufficient for a

General denial
not sufficient.

defendant in his statement of defence to deny generally the grounds alleged by the statement of claim, or for a plaintiff in his reply to deny generally the grounds alleged by a defendant by way of counter-claim, but each party must deal specifically with every allegation of fact of which he does not admit the truth, except damages (*p*), which are always to be deemed put in

(*g*) Order xix. r. 9.

(*h*) Ibid. r. 10.

(*i*) Order lxiv. r. 11.

(*j*) Ibid. r. 4.

(*k*) That is, the year when issued, the first letter of the plaintiff's name, and the number of the writ in the particular Division, thus—1897. H. No. 150.

(*l*) This would only be in the Chancery Division. In the Division the practice in which is now being considered, the Judge is never named.

(*m*) That is, the names of the plaintiff and defendant, thus: Between A. B. plaintiff and C. D. defendant.

(*n*) Order xix. r. 11.

(*o*) Ibid. r. 19.

(*p*) Ibid. r. 17.

issue unless expressly admitted (*q*). Every allegation of fact in a pleading not denied specifically, or by necessary implication, or stated in the pleading not to be admitted, is to be taken to be admitted, except as against an infant, lunatic, or person of unsound mind not so found by inquisition (*r*), and any condition precedent the performance or occurrence of which is intended to be contested, must be distinctly specified in the pleading of the defendant or plaintiff as the case may be, and subject thereto an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading (*s*). Generally, also, each party must allege all such facts not appearing in the previous pleading as he means to rely on, or which, if not raised on the pleadings, would be likely to take the opposite party by surprise, or would raise new issues of fact not arising out of the pleadings—*e.g.*, fraud or the Statute of Limitations (*t*). When a contract is alleged in any pleading, a bare denial of the contract by the opposite party is construed only as a denial of the making of the contract in fact, and not of its legality or its sufficiency in law, whether with reference to the Statute of Frauds or otherwise (*u*).

Matters not specifically denied deemed admitted.

Everything intended to be relied on must be stated in pleadings.

Every pleading claiming any relief must state specifically the relief sought, either simply or in the alternative, and it is not necessary to ask for general or other relief, which may always be given as the Court or Judge may think just, to the same extent as if it had been asked for (*v*). Any distinct claims or complaints are to be stated, as far as may be, separately and distinctly (*w*).

Claim for general relief in pleadings.

(*q*) Order XXI. r. 4.

(*r*) Order XIX. r. 13.

(*s*) Ibid. r. 14.

(*t*) Ibid. r. 15. As to setting out fraud, see *Davy v. Garrett*, 7 Ch. D. 489; 47 L. J. Ch. 218; 26 W. R. 225. *Wallingford v. Mutual Society*, 5 App. Cas. 685.

(*u*) Order XIX. r. 20.

(*v*) Order XX. r. 6.

(*w*) Order XX. r. 7.

Instances of
the shortening
of pleadings.

On the point that pleadings are to be stated as concisely as can be, the following instances may be noticed : (1) Wherever the contents of any document are material it is sufficient in any pleading to state its effect as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material (*x*). (2) Where in any pleading it is necessary to allege malice, fraudulent intention, or other condition of the mind of any person, it is sufficient to simply allege the same as a fact without setting out the circumstances from which the same is to be inferred (*y*). (3) When it is material to allege notice, it is sufficient to simply allege it as a fact unless the form or precise terms of such notice are material (*z*). (4) When any contract is to be implied from a series of letters or conversations, it is enough to allege such contract as a fact, and to refer to such conversations or letters without setting them out in detail (*a*). (5) No person need state in his pleading a fact presumed by the law in his favour, or as to which the burden of proof lies on the other side, unless the same has first been specifically denied—*e.g.*, consideration for a bill of exchange where the plaintiff sues only on the bill, and not for the consideration as a substantive ground of claim (*b*).

Forms of
pleadings.

Forms of pleadings are given in Appendices C, D, and E to the Rules of 1883, which are to be used when applicable, and in other cases such forms are to be used as nearly as applicable, and any costs occasioned by prolixity are to be disallowed (*c*). Where in any pleading a party relies on misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond

Particulars in
certain cases.

(*x*) Order xix. r. 21.

(*y*) Ibid. r. 22.

(*z*) Ibid. r. 23.

(*a*) Ibid. r. 24.

(*b*) Ibid. r. 25.

(*c*) Ibid. r. 5. See also a set of specimen pleadings in Appendix II. hereto. No technical objection can, however, be raised to any pleading on the ground of any alleged want of form (Order xix. r. 26).

such as are exemplified in such forms, particulars (with dates and items if necessary) are to be stated in the pleading, provided that if such particulars are of debt, expenses, or damages, and exceed three folios, the fact must be so stated, with a reference to full particulars already delivered or to be delivered with the pleading (*d*); and in every case in which the cause of action is a stated or settled account, the same shall be alleged with particulars, but in every case in which a statement of account is relied on by way of evidence or admission of any other cause of action which is pleaded, the same is not to be alleged in the pleadings (*e*). The signature of counsel to a pleading is not necessary, but where pleadings have been settled by counsel, or by a special pleader, they are to be signed by him, and if not so settled they are to be signed by the solicitor for the party, or by the party himself if he sues or defends in person (*f*). Signature of pleadings.

Assuming that the action is one in which pleadings are to be delivered, the first pleading is the statement of claim by the plaintiff (*g*), and the delivery of a statement of claim is regulated as follows (*h*): Statement of claim.

- (a) Where the writ is specially indorsed under Order III. Rule 6 (*i*), no further statement of claim shall be delivered, but the indorsement on the writ shall be deemed to be the statement of claim (*j*); Regulations with regard to its delivery.
- (b) Subject to the provisions of Order XIII., Rule 12, as to filing a statement of claim in certain

(*d*) Order XIX. r. 6.

(*e*) Order XX. r. 8.

(*f*) Order XIX. r. 4.

(*g*) See specimen form in Appendix II. hereto, post, p. 302.

(*h*) Order XX. r. 1.

(*i*) Ante, pp. 45, 46.

(*j*) But though no further statement of claim can be required in this case, the defendant may take out a summons for further and better particulars of the plaintiff's claim, as to which see post, pp. 111, 112.

cases (*k*) when there is no appearance, no statement of claim need be delivered unless the defendant at the time of entering appearance, or within eight days thereafter, gives notice in writing to the plaintiff or his solicitor that he requires a statement of claim to be delivered (*l*) ;

- (c) If no statement of claim has been delivered and the defendant gives notice requiring the delivery of a statement of claim, the plaintiff shall, unless otherwise ordered by the Court or a Judge, deliver it within five weeks from the time of receiving such notice ;
- (d) The plaintiff may (except as in (a) mentioned) deliver a statement of claim, either with the writ of summons or notice in lieu of writ of summons, or at any time afterwards, either before or after appearance, notwithstanding that the defendant may have appeared and not required the delivery of a statement of claim : Provided that in no case where a defendant has appeared shall a statement be delivered more than six weeks after the appearance has been entered, unless otherwise ordered by the Court or a Judge ;
- (e) Where the plaintiff delivers a statement of claim without being required to do so, or the defendant unnecessarily requires such statement, the Court or a Judge may make such order as to the costs occasioned thereby as shall be just, if it appears that the delivery of a statement of claim was unnecessary or improper.

(*k*) See post, p. 191.

(*l*) As to time to defend in such a case, see Order xxi. r. 7 ; post, p. 78.

The plaintiff in his statement of claim, whether Place of trial. contained in the indorsement on the writ or delivered separately, may specify where the action is to be tried, and if he does not state any place the trial will be in Middlesex—that is, at the Royal Courts of Justice (*m*), and this applies even although the action is one that has been assigned to a particular Judge (*n*). Where no statement of claim is delivered or required, the plaintiff may within six days after the appearance of the defendant serve a notice stating the place of trial, otherwise it will be Middlesex (*o*). If the action is one in which the plaintiff has indorsed on his writ a notice of intention to proceed to trial without pleadings, it would appear that he will state the place of trial sufficiently by mentioning it in his notice of trial (*p*).

Whenever a statement of claim is delivered the plaintiff may therein alter, modify, or extend his claim without any amendment of the indorsement of the writ (*q*), provided only that thereby the whole character of the action is not altered (*r*). Statement of claim may go beyond indorsement on writ.

If the plaintiff, being bound to deliver a statement of claim, does not deliver the same within the time allowed for that purpose, the defendant may at the expiration of that time apply to dismiss the action, with costs, for want of prosecution, and on the hearing of such application, if no statement of claim shall have been delivered, the action may be dismissed accordingly, or such other order may be made on such terms Default in delivery of statement of claim.

(*m*) Order xx. r. 5; Order xxxvi. r. 1. As to changing the place of trial, see post, p. 114.

(*n*) Order xxxvi. r. 1a. As to assignment to particular Judge, see post, p. 190.

(*o*) Order xxxvi. r. 1.

(*p*) Ante, p. 70, and see Form 16a in Supreme Court Rules of Nov. 1893. It is presumed that if no place stated but merely notice of trial given, that will operate for Middlesex.

(*q*) Order xx. r. 4.

(*r*) *Cave v. Crew*, 62 L. J. Ch. 530; 68 L. T. 224.

as the Master shall think just (*s*). Such dismissal is, however, no bar to a fresh action (*t*).

Statement of
defence.

The statement of claim being delivered, the next pleading is the statement of defence by the defendant (*u*), which must be delivered within ten days from the delivery of the statement of claim, or from the time limited for appearance, whichever shall be last (*v*). A defendant who has appeared in an action not indorsed with a notice of intention to proceed to

Defence where
no statement
of claim.

trial without pleadings, and who has neither received nor required the delivery of a statement of claim, must deliver his defence (if any) within ten days after his appearance (*w*). Where a summons has been taken out by the plaintiff under Order XIV., the time to defend does not run between the taking out of the summons and its hearing (*x*), and then if leave is, on the hearing of the summons, given to defendant to defend, he must deliver his statement of defence within such time as shall be limited by the order giving him liberty to defend, or if no time is thereby limited, then within eight days after the order (*y*).

Points to be
observed in
defences.

In actions for a liquidated demand in money comprised in Order III. Rule 6 (*z*), a mere denial of the debt is inadmissible (*a*), and in actions on bills, notes, or cheques, a defence in denial must deny some matter of fact—*e.g.*, the drawing, making, indorsing, accepting, presenting, or notice of dishonour of the instrument (*b*). In actions comprised in Order III. Rule 6 (*c*), clauses

(*s*) Order xxvii. r. 1.

(*t*) *Re Orrell Co.*, 12 Ch. D. 681.

(*u*) See specimen form in Appendix II. hereto, post, p. 303.

(*v*) Order xxi. r. 6. *Anlaby v. Praetorius*, 20 Q. B. D. 764; 57 L. J. Q. B. 287; 58 L. T. 671.

(*w*) Order xxi. r. 7.

(*x*) *Hobson v. Monks*, W. N. (1884), 8; 19 L. J. (N.) 19.

(*y*) Order xxi. r. 8.

(*z*) As to which, see ante, pp. 45, 46.

(*a*) Order xxi. r. 1. *Copley v. Jackson*, W. N. (1884), 39.

(*b*) Order xxi. r. 2.

(*c*) See ante, pp. 45, 47.

A and B, a defence in denial must deny such matters of fact, from which the liability of the defendant is alleged to arise, as are disputed—*e.g.*, in actions for goods sold the defence must deny the order or contract, the delivery, or the amount claimed; in an action for money had and received it must deny the receipt of the money, or the existence of those facts which are alleged to make such receipt by the defendant a receipt to the use of the plaintiff (*d*). If it is desired to deny the plaintiff's right in some representative capacity (*e*), or to deny the constitution of any alleged partnership firm, it must be done specifically (*f*).

There are many Acts of Parliament which entitle or permit a defendant to plead the general issue of "not guilty" only, and to give certain matters in evidence without specially pleading the same. Such pleas are still allowed in some cases (*g*), but if a defendant so plead he may not plead any other defence to the same cause of action without special leave (*h*); and where by virtue of some statute special matter may be given in evidence under a plea simply of the "general issue," and the defendant intends to avail himself thereof, he must insert in the margin of his pleading the words "by statute," together with the reference to the statute in question, and specifying whether it is a public or private Act, otherwise such defence is taken not to have been pleaded by virtue of any Act of Parliament (*i*).

General issue
pleaded by
statute.

Notwithstanding a defendant may succeed in an action, and thus get the general costs of it, if by his

Costs may be
given where
defendant has
improperly
denied matters.

(*d*) Order xxi. r. 3.

(*e*) See ante, p. 44.

(*f*) Order xxi. r. 5.

(*g*) *P.g.*, by 21 Jac. I. c. 4, s. 1, "not guilty by statute" may be pleaded in penal actions, and see further Annual Practice (1897), 532, note to Order xxi. r. 19. All provisions in local and personal acts allowing such pleas were repealed by 5 & 6 Vict. c. 97, s. 8, and all provisions allowing such pleas in the case of actions against public authorities were repealed by 56 & 57 Vict. c. 61, s. 2.

(*h*) Order xix. r. 12.

(*i*) Order xxi. r. 19.

defence he has put the plaintiff to the proof of facts which in the opinion of the Court or a Judge ought to have been admitted, the Court or a Judge may make such order as to the extra costs occasioned thereby as shall be just (*j*).

Set-off and
counter-claim.

If a person who is sued has himself some claim against the party suing him, he may set this up by way of set-off or counter-claim, even although it is a claim not liquidated but sounding in damages; and such set-off or counter-claim has the same effect as a statement of claim in a cross-action, so as to enable the Court to pronounce a final judgment in the same action both on the original and on the cross-claim, and if there is a balance in favour of the defendant to give judgment for the defendant for such balance (*k*). If, however, the plaintiff contends that the matter raised by the counter-claim ought not to be thus raised, but should be the subject of an independent action, he may, at any time before reply, apply to the Court or a Judge for an order that such counter-claim may be excluded, and the Court or a Judge may on the hearing of such application make such order as shall be just (*l*). Any defendant seeking to rely upon any facts as supporting a counter-claim must in his statement of defence state specifically that he does so by way of counter-claim (*m*).

Counter-claim
may be con-
tinued though
plaintiff's
action stayed.

If in any case in which the defendant sets up a counter-claim the action of the plaintiff is stayed, discontinued, or dismissed, the counter-claim may nevertheless be proceeded with (*n*).

No pleas in
abatement.

No defence is now allowed to be pleaded in abatement (*o*). A plea in abatement, or dilatory plea, was

(*j*) Order xxi. r. 9. And see also post, p. 89, as to a notice to admit facts. (*k*) Order xix. r. 3; Order xxi. r. 17.

(*l*) Order xxi. r. 15.

(*n*) Ibid. r. 16.

(*m*) Ibid. r. 10.

(*o*) Ibid. r. 20.

one of some matter not material to the merits of the proceeding, but technically necessary or proper—*e.g.*, to the jurisdiction, or on account of the death of one of the parties, marriage of a female party, &c. (*p*). Another point of old practice prior to the Judicature Acts, which may be mentioned, was a new assignment, which occurred where from the very general terms of the declaration the defendant was led to apply his plea to a different matter to what the plaintiff had in view (*q*)—*e.g.*, if A sued B generally for an assault, and B had assaulted A twice, but once it was justifiable, here B might choose to consider that A was suing in respect of the justifiable assault and plead accordingly, which would place A in a difficulty he could only overcome by new assigning. Under the present system of pleadings such a state of things could now hardly arise, and it is also specially provided that no new assignment is to be used, but everything which was formerly alleged by way of new assignment may be introduced by way of amendment of the statement of claim, or by way of reply (*r*).

No new assignments.

If the defendant being bound to put in a statement of defence does not do so within the proper time, the next step by the plaintiff is to proceed on his default, and in the same way as we have seen that the plaintiff's course when the defendant does not appear to the writ, differs according to the nature of the claim (*s*), so also here the course differs according to what the plaintiff is suing for.

Default in delivery of defence.

Firstly.—If the plaintiff's claim is only for a debt or liquidated demand, and the defence is not delivered within the time allowed, the plaintiff may at once sign final judgment for the debt and costs to be taxed, and

Where action for a liquidated demand.

(*p*) Brown's Law Dict., 2nd ed. p. 3, tit "Abatement, Pleas in."

(*q*) Brown's Law Dict., p. 363, tit. "New Assignment."

(*r*) Order XXIII. r. 6.

(*s*) Ante, pp. 61-64.

may issue execution against him, or if there are several defendants against any one of them making default (*t*).

Where action
for an
unliquidated
demand.

Secondly.—If the action is for detention of goods, and damages, or either of them, interlocutory judgment may be signed and a writ of inquiry issued (*u*); and if there are several defendants, and only one makes default, interlocutory judgment may be signed as to that one, and the action proceeded with against the others, no separate writ of inquiry being issued, but the damages as to all being assessed at the trial, unless otherwise ordered (*v*).

Where claim
for debt, and
for damages,
&c.

Where the plaintiff's claim comes partly under this second head and partly under the first, and any defendant makes such default as aforesaid, the plaintiff may enter final judgment for the liquidated amount and interlocutory judgment for the residue, and proceed as before detailed with regard to each separate part (*w*).

Where action
for recovery
of land.

Thirdly.—If the action is for the recovery of land the plaintiff may sign judgment to recover possession, and for his costs (*x*), and where he has in addition claimed mesne profits, arrears of rent, or double value or damages, the plaintiff may as to them proceed as already pointed out in respect of money claims (*y*).

Course where
defence goes
only to part
of claim.

If in any of the foregoing cases a defence is put in which goes only to part of the claim, the plaintiff may by leave enter judgment, final or interlocutory as the case may be, for the part unanswered, provided that it consists of a separate cause of action, or is severable from the rest, and provided also that, where there is a counter-claim, execution on any such judgment shall not issue without leave (*z*).

(*t*) Order xxvii. rr. 2, 3.

(*u*) As to a writ of inquiry, see ante, p. 63.

(*v*) Order xxvii. rr. 4, 5.

(*w*) Ibid. r. 7.

(*x*) Ibid. r. 6.

(*y*) Ibid. r. 8.

(*z*) Ibid. r. 9.

The next pleading is the reply by the plaintiff (*a*), Reply, which must be delivered within twenty-one days after the statement of defence, or if there are several defendants then within that time after the last of the statements of defence shall have been delivered (*b*). This is most usually merely a joinder of issue—that is, a traverse or denial and putting in issue of the facts alleged by the defendant in his defence, and if this is so here the pleadings terminate (*c*). No pleading subsequent to the reply is allowed, except a joinder of issue, without leave of the Court or a Judge, and then upon such terms as the Court or a Judge shall think fit (*d*). Such subsequent pleading is styled a rejoinder. A common case in which joinder of issue is usually delivered after reply is where the defendant's statement of defence contains also a counter-claim, for this being in effect equivalent to a statement of claim in a cross action, the plaintiff's reply is equivalent to his statement of defence therein, and it is indeed provided that where a counter-claim is pleaded, a reply thereto shall be subject to the rules applicable to the statement of defence (*e*). Should any pleading subsequent to reply be necessary, it must be delivered within four days after the delivery of the previous pleading, unless otherwise ordered (*f*).

If the plaintiff does not deliver a reply, or any party does not deliver any subsequent pleading within the time allowed for that purpose, the pleadings are deemed to be closed at the expiration of that period, and all the material statements of fact in the pleading last delivered are deemed to have been denied and put in issue (*g*). If, however, the defendant has put in a

(*a*) See specimen form in Appendix II. hereto, post, p. 303.

(*b*) Order XXIII. r. 1.

(*c*) Order XIX. r. 18.

(*d*) Order XXIII. r. 2.

(*e*) Ibid. r. 4. But the time for the reply is still twenty-one days: Ibid. r. 1. *Rumley v. Winn*, 22 Q. B. D. 265; 58 L. J. Q. B. 128; 60 L. T. 32.

(*f*) Order XXIII. r. 3.

(*g*) Order XXVII. r. 13.

counter-claim, and the plaintiff has put in no defence thereto (which should, of course, be in his reply), this would not apply as regards the counter-claim, but the defendant's course as to that would be to move for judgment thereon (*h*).

When the pleadings are closed.

As soon as either party has simply joined issue upon any pleading of the opposite party without adding any further or other pleading thereto, or has made default as mentioned in the last preceding paragraph, the pleadings as between such parties are deemed to be closed (*i*), and their object being attained the cause is ready to go to trial; but if it is made to appear to a Judge that the pleadings do not sufficiently define the issues of fact in dispute between the parties, he may direct them to prepare issues to be tried, to be settled by the Court or a Judge if they differ on them (*j*).

No demurrer now allowed.

A demurrer was a step formerly very often had recourse to during the pleadings, but under the present practice no demurrer is allowed (*k*). A demurrer was the formal mode of disputing the sufficiency in law of the pleading of the other side (*l*), occurring when the plaintiff or defendant, as the case might be, admitted, for the sake of argument, that what was stated in his opponent's pleading was true, but denied that it gave him any good ground of action or defence. Thus, take the case of an indorsee for value of a bill of exchange suing the acceptor, who simply sets up in his defence that he received no value. This, though it would have been a good defence to an action brought against him by the drawer, is no defence to the action of the

(*h*) *Street v. Crump*, 25 Ch. D. 68; 32 W. R. 89, deciding that Order xxiii. r. 4, and Order xxvii. rr. 11, 12, apply to such case. *Higgins v. Scott*, 21 Q. B. D. 10; *Jones v. Macaulay* (1891), 1 Q. B. 221; 60 L. J. Q. B. 258; 64 L. T. 621.

(*i*) Order xxiii. r. 5.

(*j*) Order xxxiii. r. 1. See hereon *Barber v. Mackrell*, 12 Ch. D. 534.

(*k*) Order xxv. r. 1.

(*l*) Brown's Law Dict., 2nd ed. p. 169, tit. "Demurrer."

indorsee for value, and would have presented a case for a demurrer (*m*).

Instead of demurring, a party is now entitled to raise by his pleading (*n*) any point of law, and any point so raised is to be disposed of by the Judge who tries the cause at or after the trial, provided that by consent of the parties, or by order of the Court or a Judge, on the application of either party, the same may be set down for hearing and disposed of at any time before the trial (*o*). Thus, a defendant in his defence, say, in paragraphs 1 and 2 may deal with matters of fact, and in paragraph 3 submit a point of law which he would formerly have raised by demurrer. If in the opinion of the Court or Judge the decision on any point of law so raised substantially disposes of the whole action, or of any distinct cause of action, defence, set-off, counter-claim, or reply therein, the Court or Judge may thereupon dismiss the action, or make such other order therein as may be just (*p*).

Course instead of demurring.

As a further assistance in cases of improper pleading, instead of a demurrer the Court or a Judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court or a Judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just (*q*). In addition to this any matter in any pleading which may be unnecessary

Striking out pleading.

Embarrassing pleading.

(*m*) As an instructive instance of what would formerly have been the subject of a demurrer, see *Griffiths v. London and St. Katharine's Docks*, 13 Q. B. D. 259; 53 L. J. Q. B. 504; 33 W. R. 35.

(*n*) Of course if it is an action being tried without pleadings, it may simply be raised at the trial subject to the necessity of stating the matter in the particulars where they have been ordered to be delivered. (See ante, pp. 70, 71.)

(*o*) Order xxv. r. 2.

(*p*) Ibid. r. 3.

(*q*) Ibid. r. 4. See *Batthyany v. Walford*, 32 W. R. 379; W. N. (1884), 37.

or scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action, may be ordered to be struck out, with costs as between solicitor and client if thought fit (*r*).

Claim for judgment declaratory only, allowed.

It is specially provided that no action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right, whether any consequential relief is or could be claimed or not (*s*). The jurisdiction, however, under this provision is exercised but rarely, and always with great caution (*ss*).

Defences arising pending the action.

Most defences have existed before action brought; but sometimes a defence may arise only after it has been commenced—*e.g.*, where after it is brought the defendant gets his discharge in bankruptcy. Such a defence, although it did not exist when the action was brought, may be set up either by the defendant, or by the plaintiff to a counter-claim, but if it arises on the defendant's part after statement of defence has been delivered, or after the expiration of the time for delivering the statement of defence, or if it arises on the plaintiff's part after reply has been delivered, or after the expiration of the time for delivering it, it can only be set up within eight days of its having arisen, and by leave of the Court or a Judge (*t*). Where a defendant has set up any defence that has arisen pending the action, the plaintiff may at once confess it, and—as it did not exist when he brought his action—may sign judgment for his costs up to the time of pleading it (*u*). This practice is similar to the former plea of *puis darrein continuance*, prior to the Judicature Acts. A plaintiff may in his reply to a counter-claim of the defendant,

Where plaintiff may admit and sign judgment for costs.

Counter-claim in reply.

(*r*) Order XIX. r. 27.

(*s*) Order XXV. r. 5.

(*ss*) See note to Order XXV. rule 5, in Annual Practice (1897), 569, 570.

(*t*) Order XXIV. rr. 1, 2.

(*u*) Ibid. r. 3.

counter-claim in respect of a cause of action accrued after the issue of the writ, but arising at the same time and out of the same transaction as the counter-claim of the defendant (*v*).

Very full powers of amendment of pleadings exist. Amendment of pleadings. The Court or a Judge has power at any stage of the proceedings, even at the trial, to allow either party to amend the indorsement of writ, statement of claim, defence, or reply, in such manner and on such terms as may be just; and all such amendments may be made as may be necessary for the purpose of determining the real question in controversy between the parties (*w*). On an application for leave to amend the Court is bound to allow any amendment which would lead to the determination of the real question in controversy; but the terms of amendment are entirely in the Court's discretion, and an amendment will not be allowed where the opposite party cannot be recouped by allowance of costs or otherwise (*x*).

In certain cases a party is allowed to amend his pleading without leave, viz. : When amendments may be made without leave.

1. A plaintiff may once at any time before the expiration of his time to reply, and before replying, or where no defence has been delivered within four weeks from the appearance of the defendant who last appeared, amend his statement of claim, whether indorsed on the writ or not, without any leave (*y*).

2. A defendant, also, *who has set up in his defence any set-off or counter-claim*, may at any time before the expiration of the time allowed him for answering the reply, and before such answer, or in case there is

(*v*) *Toke v. Andrews*, 8 Q. B. D. 428; 51 L. J. Q. B. 281; 30 W. R. 659.

(*w*) Order xxviii. rr. 1, 6, 12.

(*x*) *Steward v. North Metropolitan Tramway Co.*, 16 Q. B. D. 180; 55 L. J. Q. B. 157; 54 L. T. 35.

(*y*) Order xxviii. r. 2.

no reply, then at any time before the expiration of twenty-eight days from the filing of his defence, *amend such set-off or counter-claim* without any leave (z).

Disallowing
improper
amendment.

To prevent improper amendment in cases where leave is not required, it is provided that any such amendment, made without leave, may on application, within eight days of delivery, be disallowed if the Court or a Judge considers proper to so disallow it, or it may be allowed on such terms as to costs or otherwise as may be just (a).

Time to amend
under order.

When an order for leave to amend is made the pleading must be amended within the time named in the order, or if no time is named, then within fourteen days from the date of the order, otherwise it becomes *ipso facto* void, unless the time is extended (b).

How amend-
ments made.

Every amended indorsement or pleading must be marked with the date of the order (if any) under which it is amended, and also with the day on which the amendment is made, and be delivered to the opposite party within the time allowed for amending. If the amendments do not exceed one hundred and forty-four words (two folios) in any one place, they may be made in writing unless it would render the pleading difficult or inconvenient to read, in which case, or if they exceed the before-mentioned length, the pleading must be reprinted (c).

Pleading to
amendments.

Where any party has amended his pleading without leave when entitled to do so, the opposite party should plead to the amended pleading, or amend his pleading, within the remainder of the time he then has still left to plead, or within eight days from the delivery of the amendment, whichever shall last expire ; and in case the

(z) Order xxviii. r. 3. It will be observed that this only applies to amendment of the set-off or counter-claim, and not to the defence itself.

(a) Order xxviii. r. 4.

(b) Ibid. r. 7.

(c) Ibid. rr. 8, 9, 10.

opposite party has pleaded before the delivery of the amendment, and does not plead again or amend within the time above-mentioned, he shall be deemed to rely on his original pleading in answer to such amendment (*d*).

With a view to saving expense and expediting matters, it is provided that any party to a cause or action may give notice by his pleading, or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party (*e*). It is also provided that any party may not later than nine days before the day for which notice of trial has been given, serve a notice, calling on any other party to admit for the purposes of the cause, matter, or issue, any specific fact or facts mentioned in such notice. In case of refusal or neglect to admit within six days after service of such notice, or within such further time as shall be allowed, the costs of proving any such facts shall in any event be paid by the party so neglecting or refusing, unless at the trial the Judge certify that the refusal to admit was reasonable, or unless the Court or a Judge subsequently so order. Any such admissions that may be made are, however, only to be deemed to be made for the purposes of the particular cause, matter, or issue, and not as an admission to be used against the party on any other occasion, or in favour of any person other than the party giving the notice. The Court or a Judge is empowered at any time to allow any party to amend or withdraw any such admission on such terms as may be just (*f*). An affidavit of the solicitor or his clerk of the due signature of any admission is sufficient evidence thereof (*g*).

Notice of admission of certain facts.

Notice to opponent to admit certain facts.

Consequence of not admitting.

Effect of admissions.

Any party may at any stage of the action apply to the Court or a Judge for such judgment or order as he may upon any admissions of fact either in the plead-

Applying on admissions.

(*d*) Order xxviii. 1. 5.

(*e*) Order xxxii. r. 1.

(*f*) Ibid. r. 4. See form of Notice to admit Facts in Appendix II. hereto, post, p. 304.

(*g*) Ibid. r. 7.

ings or otherwise be entitled to, without waiting for the determination of any other question, and the Court or a Judge may make such order or give such judgment as may seem just (*h*). Such an application should be by summons in Chambers in the Queen's Bench Division (*i*) but usually by motion for judgment in the Chancery Division (*ii*).

Interlocutory applications.

Between the appearance and the close of the pleadings, in every action various interlocutory applications of more or less importance are invariably made, and other interlocutory steps may be taken. Before, therefore, proceeding further with the direct course of an ordinary action it is necessary to devote some attention to them, which is done in the next chapter.

Forms of pleadings.

In the Appendix II. hereto, the student will find a complete set of ordinary and simple pleadings in an imaginary action (*j*).

Defence in action for recovery of land.

In an action for recovery of land the rules as to pleadings are not quite the same as in other actions, it being provided that a defendant in any such action, in possession by himself or his tenant, need not plead his title unless his defence is of an equitable nature—*e.g.*, that he is in possession under an oral contract of sale; but except in such case, it is sufficient for the defendant to state that he is so in possession, and it shall be taken to be implied in such statement that he denies or does not admit the allegations of fact contained in the plaintiff's statement of claim, and he may rely upon any ground of defence he can prove (*jj*). The Statute of Limitations is not an equitable defence, and therefore in an action for recovery of land it need not be specially pleaded if the defendant pleads that he is in possession (*k*).

(*h*) Order xxxii. r. 6. (*i*) *Gough v. Healey*, 49 L. T. 772.

(*ii*) *Cook v. Heynes*, W. N. (1884), 75. (*j*) Post, pp. 302, 303.

(*jj*) Order xxi. r. 21. For other peculiarities in action for recovery of land, see ante, pp. 38, 50, 58, and post, p. 168.

(*k*) Annual Practice, (1897) 533, notes to Order xxi. r. 21.

CHAPTER IV.

INTERLOCUTORY PROCEEDINGS.

INTERLOCUTORY applications are sometimes made to the Court, sometimes to a Judge or Master in Chambers. When the application is made in Chambers it is by means of a summons, unless, indeed, it is *ex parte*, when usually no summons is necessary. When the application is made to the Court, it is by means of a motion (a). How inter-locutory applications made.

With regard to motions it is provided (b) that, except where under the old practice before the Judicature Acts any order or rule might be made absolute *ex parte* in the first instance, and except where otherwise provided, no motion shall be made without previous notice to the parties affected thereby. But the Court or a Judge, if satisfied that the delay caused by proceeding in the ordinary way would or might entail irreparable or serious mischief, may make an order *ex parte*, upon such terms as to costs or otherwise, and subject to such undertaking (if any) as the Court or Judge may think just; and any party affected by such order may move to set it aside. Two clear days' notice of motion must be given (c), and the motion is then entered in a list for hearing and comes on in its turn; and if on the hearing of any motion the Court Notice of motion.

(a) Order LII. r. 1.

(b) *Ibid.* r. 3.

(c) Order LII. r. 5. But this rule also provides that in applications to answer the matters in an affidavit or to strike off the rolls, the notice of motion shall be served not less than ten clear days before the time fixed by the notice for making the motion.

or a Judge is of opinion that any person to whom notice has not been given ought to have had notice, the Court or Judge may dismiss the motion, or adjourn the same in order that service may be effected, on such terms as may seem proper (*d*). The hearing of any motion may also be adjourned from time to time on such terms as the Court or Judge shall think fit (*e*).

Notice of
motion where
no appearance.

A plaintiff is at liberty, without any special leave, to serve any notice of motion or other notice upon any defendant who, having been duly served with a writ or summons, has not appeared within the time limited for

Serving notice
of motion with
the writ.

that purpose (*f*). The plaintiff may also by leave of the Court or a Judge, to be obtained *ex parte*, serve any notice of motion upon any defendant at the same time as he is served with the writ of summons, or at any time after service thereof, and before the time limited for the appearance of such defendant (*g*).

Procedure on
summons.

Every application at Chambers not made *ex parte* is made by summons, and the practice observed as to the hearing of summonses in this Division is to place them in a list returnable at certain fixed hours (*h*), and according to the special arrangements as to Masters before detailed (*i*), the list distinguishing those which are to be attended by counsel from those which are not to be so attended (*k*). At the time named the list is called over and the summonses are heard, but if on the first calling one of the parties is not present, it is, when the list is gone through again, called a second time, and the other party is then entitled to attend the summons *ex parte* on an affidavit of service simply, no affidavit of non-attendance being required or allowed (*l*); and if neither party is present at the

(*d*) Order LII. r. 6.

(*e*) Ibid. r. 7.

(*f*) Ibid. r. 8. The notice need not be filed under Order LXVII. r. 4, as well as served. Annual Practice, (1897) 963, notes to Order LII. rule 8.

(*g*) Ibid. r. 9.

(*h*) Order LIV. r. 26.

(*i*) Ante, p. 22.

(*k*) Order LIV. r. 27.

(*l*) Ibid. r. 5.

second calling, the summons is struck out of the list. Summonses for time are usually made returnable at 10.30, and heard in priority to other summonses, and are not placed in any list (*m*).

In both the Queen's Bench and the Chancery Divisions any party may if he so choose be represented in Chambers by counsel (*n*), but it is provided that the costs of counsel shall not be allowed unless the Judge or Master certifies it to be a proper case for counsel (*o*). Certificate for counsel.

A summons ordinarily requires to be served two clear days before the return thereof, unless in any case it shall be otherwise ordered; but a summons for time may be served on the day previous to the return thereof (*p*). A summons under Order XIV. must, as has been already noticed, be served four clear days before the hearing (*q*), and so also must a summons for directions (*r*). Service of summons.

If on any matter coming before a Master or District Registrar, it appears proper for the decision of a Judge, he may refer the same to a Judge, and the Judge may either dispose of the matter or refer the same back to the Master or the District Registrar, with such directions as he may think fit (*s*). Referring matter to Judge.

A summons need not necessarily only refer to one matter, but several matters may be included therein, and all general directions given thereon (*t*); and where at the return of a summons the matters in respect of Summons may relate to several matters.

(*m*) Order LIV. r. 20.

(*n*) Order LV. r. 1a.

(*o*) Order LXV. r. 27 (16). This provision applies not only on taxing costs against an opponent, but also to cases of solicitor and client taxations. Re *Chapman*, 10 Q. B. D. 54; 52 L. J. Q. B. 75; 47 L. T. 426.

(*p*) Order LIV. r. 4.

(*q*) Ante, p. 66.

(*r*) Post, p. 94.

(*s*) Order LIV. r. 20. See also as to appeals from decisions in Chambers, post, pp. 127, 128.

(*t*) Ibid. r. 9.

Summons for directions.

which it is issued are not disposed of, the parties are to attend from time to time without further summons, at such time or times as may be appointed for the consideration or further consideration thereof (*v*). In particular, with regard to various interlocutory applications mentioned in this chapter, it is provided that in every cause or matter not specially assigned to the Chancery Division, one general summons for directions may be taken out at any time by any party. Such summons must be returnable in not less than four days, and upon its hearing the Judge shall so far as practicable make such order as may be just with respect to all the interlocutory proceedings to be taken in the action before the trial and as to the costs thereof, and more particularly with regard to the following matters: Pleading, particulars, admissions, discovery, interrogatories, inspection of documents, inspection of real or personal property, commissions, examination of witnesses, and place or mode of trial. On the hearing of the summons any party as far as practicable should apply for any order or directions as to any interlocutory matter or thing which he may desire. No affidavit is allowed to be used in support of the summons except by special leave (*w*).

Applications subsequent to a summons for directions.

A summons for directions once having been taken out, any application subsequently for any directions as to any interlocutory matter is made under the original summons by giving two clear days' notice to the other party, stating the grounds of the application, and thus the issue of any fresh summons is avoided. Any application by any party which might have been made at the hearing of the original summons is, if granted on a subsequent application, granted only at the cost of the party applying, unless the Judge is of opinion

(*v*) Order L.IV. r. 8.

(*w*) Order xxx. rr. 1-7. See forms of Summons for Directions and Order thereon in Appendix II. hereto, post, p. 305.

that the application could not properly have been made at the hearing of the original summons (*x*).

Where, a party not attending, a summons is proceeded with *ex parte*, such proceeding is not to be reconsidered in Chambers unless the Judge shall be satisfied that the party failing to attend was not guilty of wilful default or negligence, and in such case the costs occasioned by his non-attendance are in the discretion of the Judge, who may fix the same at the time and direct them to be paid by the party or his solicitor before he shall be permitted to have such proceeding reconsidered, or he may make such other order as to such costs as he may think just (*y*). And where a proceeding in Chambers fails by reason of the non-attendance of any party, and the Judge does not think it expedient to proceed *ex parte*, the Judge may order such an amount of costs (if any) as he shall think reasonable to be paid to the party attending, by the absent party, or by his solicitor personally (*z*).

Consequence of non-attendance on summons.

Solicitor may be ordered personally to pay costs.

Orders when made are drawn up, and sealed, and marked with the name of the Judge or Master by whom made (*a*), but where they do not embody any special terms, nor include any special directions, but simply enlarge time for taking any proceeding or doing any act, or give leave (*a*) for the issue of writs other than a writ of attachment; (*b*) for the amendment of any writ or pleadings; (*c*) for the filing of any document; or (*d*) for any act to be done by any officer of the Court other than a solicitor, it is not necessary to draw up such order unless the Court or a Judge shall otherwise direct, but production of the Judge's or Master's note or memorandum of any such order is sufficient. A direction that the costs of any order shall be costs in the cause, is not deemed a special direction so

Drawing up of orders, and when not to be drawn up.

(*x*) Order xxx. rr. 5, 6.

(*z*) Ibid. r. 7.

(*y*) Order LIV. r. 6.

(*a*) Ibid. r. 29.

as to render it necessary to draw up an order. Any such order not drawn up is perfected by the solicitor of the person on whose application such order is made, forthwith giving notice in writing to such person (if any) as would be served with the order were it drawn up (*b*).

Summons for time.

A very frequent application is for an extension of the time allowed for taking the different steps in an action, or for filing answers to interrogatories, affidavit of discovery, or the like, and such extension may be granted even after the expiration of the time appointed or allowed (*c*). With regard, however, to obtaining any such time the proper course now is to apply to the other side in the first instance for a consent to the required extension (*d*). If this application is not made, the extra cost of the summons for time is not usually allowed, and if the party applied to improperly refuses to consent, he is ordered to pay the extra cost of the summons (*e*).

Consent for time.

One application for time practically always granted.

Granting time on terms.

As a matter of practice it is a general rule to always grant one application for time to deliver a pleading, but for any further time some special reason must be shown, and then the party applying usually has to pay the costs of the application; and generally the costs of such applications are in the discretion of the Taxing Master (*f*). The Judge or Master also in granting any extension, is not granting anything that the party is entitled to as a right, but is granting a favour, and therefore although the times allowed by the order of Court for the various steps in an action being taken cannot in any direct way be curtailed, a Master can always, in giving time, put the party under any

(*b*) Order LII. r. 14.

(*c*) Order LXIV. r. 7. Such a summons may be issued returnable for the next day (Order LIV. r. 4).

(*d*) Ibid. r. 8.

(*e*) Order LXV. r. 27 (24).

(*f*) Ibid.

terms; for instance, on granting a defendant time to deliver his statement of defence, the Judge or Master can do so on the terms that he shall take short notice of trial instead of what he is entitled to (*g*), or the best notice of trial that the plaintiff may be able to give, so as to enable him to have the cause tried without delay. Sometimes, too, the order for time is made "peremptory," which does not absolutely preclude the party from again applying, but operates as a strong expression of opinion that the pleading should be delivered, or affidavit filed, as the case may be, within that time, so that after such an order it is very difficult to get any further extension.

Payment of money into Court in an action is a step that very frequently occurs. An action may be brought against a defendant in respect of a matter on which he admits a liability, but not to the extent claimed by the plaintiff; here to go on and contest the question of amount only, would probably entail on the defendant the costs of the action, for the plaintiff would recover something; but if he pays a sum into Court the plaintiff will, if he goes on, be doing so at his own risk as to costs if he does not recover more than paid in.

A defendant in any action to recover a debt or damages, or a plaintiff in a like claim made against him by the defendant in his counterclaim, is at liberty to pay money into Court at any time before or at the time of delivering his defence, or by leave of the Court or a Judge at any later time, which payment in is taken to admit the claim or cause of action in respect of which it is paid in (*gg*); or he may, with a defence denying liability (except in actions or counter-claims for libel or slander) (*h*), also pay money into Court to

(*g*) Post, pp. 134, 135.

(*gg*) Order xxii. r. 1, 9.

(*h*) See hereon *Fleming v. Dollar*, 23 Q. B. D. 388; 58 L. J. Q. B. 548; 61 L. T. 230.

Request for payment in.	<p>be subject to the provisions presently mentioned (<i>i</i>). A request has to accompany the payment in, which must be in a certain form, and must state the circumstances under which paid in—viz., whether paid in in satisfaction of the plaintiff's claim, or against the plaintiff's claim together with a defence denying liability (<i>j</i>). In an action on a bond under the Statute 8 & 9 Will. III. c. 11 (<i>k</i>), payment into Court is admissible to particular breaches only, and not to the whole action generally (<i>l</i>). Any payment into Court is signified in the defence, and the claim or cause of action in respect of which it is paid in must be specified therein (<i>m</i>). And where any defence sets up a tender before action, the money alleged to have been tendered must be brought into Court (<i>n</i>). Where, however, a plaintiff claims for distinct pieces of work and labour alleged in separate paragraphs of the statement of claim, a defendant need not in paying money into Court specify in his defence how much is paid in in respect of each head of claim (<i>o</i>). If the money is paid into Court at the time of delivering the defence, the fact of payment in appears thereon, and the official receipt is in practice written in the margin of the statement of defence which is delivered, but if it is paid in before defence, the defendant thereupon serves upon the plaintiff a notice that he has paid in such money, and in respect of what claim (<i>p</i>).</p>
In action on a bond.	
Payment in must accompany plea of tender.	
Evidence of payment in.	
When money may be taken out of Court.	<p>Money paid into Court may be paid out to the plaintiff on his request, or to his solicitor on the plaintiff's written authority, unless otherwise ordered, in the following cases, viz.:</p>

(*i*) Order xxii. r. 1.

(*j*) Supreme Court Funds Rules, 1894, r. 32.

(*k*) See ante, p. 64.

(*l*) Order xxii. r. 1.

(*m*) Ibid. r. 2.

(*n*) Ibid. r. 3.

(*o*) *Paraire v. Loibl*, 49 L. J. (C. P.) 481; 43 L. T. 427.

(*p*) Order xxii. r. 4.

- (a) When payment into Court is made before delivery of defence ;
- (b) When the liability of the defendant to the claim in respect of which it is paid in is not denied in the defence ;
- (c) When payment into Court is made with a defence setting up a tender of the sum paid (q).

With regard to the case (a) above-mentioned, the plaintiff may within four days after receipt of notice of payment in, and with regard to cases (b) and (c)—that is, where payment in is first stated in the defence—before reply, give notice to the defendant that he accepts it in satisfaction of the causes of action in respect of which it is paid in. The plaintiff is then in cases (a) and (b) at liberty in case the entire claim or cause of action is thereby satisfied, to tax his costs after the expiration of four days from the service of such a notice as aforesaid on the defendant, unless the Court or a Judge shall otherwise order, and in case of non-payment of such costs within forty-eight hours after taxation, he may sign judgment therefor (r). If the plaintiff does not accept the sum so paid in in satisfaction he may nevertheless take it out of Court and proceed with his action (s) ; but if thereafter the jury award a less sum than was so paid in, the excess may be ordered to be returned, and if the money has not been taken out of Court the excess will be ordered to be returned to the defendant (t), and beyond this the whole money in Court may be ordered by the Judge to be retained to answer costs (if any) awarded to the defendant (u).

(q) Order xxii. r. 5.

(r) Ibid. r. 7.

(s) Annual Practice, (1897) 534, notes to Order xxii. rule 1.

(t) *Gray v. Bartholomew*, (1895) 1 Q. B. 209 ; 64 L. J. Q. B. 125 ; 71 L. T. 867.

(u) *Best v. Osborne*, 12 Times Reports, 419.

Position when
money paid
into Court
but liability
denied.

When the liability of the defendant in respect of the claim or cause of action in satisfaction of which the payment into Court has been made is denied in the defence the following rules apply :

- (a) The plaintiff may accept the sum in satisfaction of the claim in respect of which it is paid in, and in that event is at liberty to have the money paid out to him, notwithstanding the defendant's denial of liability, whereupon all further proceedings in respect of such claim, except as to costs, shall be stayed ; or the plaintiff may refuse to accept the money in satisfaction, and reply accordingly, in which case the money shall remain in Court :
- (b) If the plaintiff accepts the money he may serve a notice to that effect, or he may reply accepting the money, and thereupon is entitled to have it paid out to himself on request, or to his solicitor on his written authority, unless the Court or a Judge shall otherwise order ;
- (c) If the plaintiff does not accept the sum as aforesaid it remains in Court, and is not to be paid out except in pursuance of an order. If the plaintiff ultimately recovers less than such sum, the amount in Court is to be applied, so far as is necessary, in satisfaction of the plaintiff's claim, and the balance (if any) repaid to the defendant. If the defendant succeeds in respect of such claim the whole amount is to be repaid to him (v).

(v) Order XXII. r. 6. As to mode of lodgment of money into Court, see Supreme Court Funds Rules, 1894, rr. 29-32, and ante, p. 98.

It may be well to point out the exact advantage that a defendant may gain by paying money into Court with an alternative denial of liability. It is this: he makes, as it were, an offer of so much to the plaintiff to settle, and if the plaintiff accepts it he takes it out, gets his costs, and there is an end of the matter (*w*). If, on the other hand, the plaintiff does not accept it, and the action goes on, then, if the plaintiff does not recover more than so paid in, the defendant gets his costs as against the plaintiff. Practically in such a case the defendant is the party entitled to judgment (*x*).

Advantage of paying money into Court with a defence denying liability.

A plaintiff may, in answer to a counter-claim, pay money into Court in satisfaction thereof, subject to the like conditions as to costs and otherwise as upon payment into Court by a defendant (*y*).

Payment into Court by plaintiff in respect of counter-claim.

Where before delivery of defence money has been paid into Court under the provisions of Order XIV. (*z*), the defendant may by his pleading appropriate the whole or any part thereof, and any additional payment, if necessary, to the whole or any specified portion of the plaintiff's claim; and the money so appropriated is thereupon deemed to be money paid into Court at that time (*a*). The proper course for the defendant to take in such a case is to leave at the Pay Office a notice of appropriation in a certain form, giving the particulars of the credit to which the money is then standing, and the date of the order under which paid in, and the amount to be appropriated, and whether in satisfaction of a claim, or against a claim with a defence denying liability; and thereupon for the purposes of payment out of Court, the money mentioned in the

Appropriation of money paid into Court under Order XIV. summons.

(*w*) *McIlwraith v. Green*, 14 Q. B. D. 766; 52 L. T. 81.

(*x*) *Wheeler v. United Kingdom Telephone Co. Limited*, 13 Q. B. D. 597; 53 L. J. Q. B. 466; 50 L. T. 799.

(*y*) Order xxii. r. 9.

(*z*) *Ante*, p. 66.

(*a*) Order xxii. r. 11.

notice becomes subject to the same rules as if then paid in (*b*).

Payment into Court not to be communicated to jury.

It is provided that where an action is tried by a Judge with a jury, no communication to the jury is to be made until after the verdict is given, either of the fact that money has been paid into Court or of the amount paid in, but the jury are to be required to find the amount of the debt or damages, as the case may be, without reference to any payment into Court (*c*). If the jury are inadvertently informed of the payment into Court, it would appear that the proper course is to discharge them and have the cause tried by a fresh jury on another day (*d*). Where in an action of libel the defendant pleads absence of malice, or negligence, and an apology and payment into Court under 6 & 7 Vict. c. 96, sect. 2 (*e*), the rule as to not informing the jury does not apply, and they may properly be informed on the matter, and left to decide whether the sum paid in is or is not sufficient (*f*).

Discovery, inspection, &c.

Discovery and inspection of documents are very important interlocutory proceedings. Either plaintiff or defendant may find it necessary or advisable in the course of an action to obtain information as to certain facts from his opponent, or to know what documents he has in his possession relating to the matters in question in the action, and to inspect the same.

Interrogatories.

The first of these objects—viz., discovery of facts, is attained by means of interrogatories, which are certain written questions administered to the other party to the action, in accordance with a form given in the Rules

(*b*) Supreme Court Funds Rules, 1894, r. 43. As to payment out, see ante, p. 99.

(*c*) Order xxii. r. 22.

(*d*) Mr. Justice Kennedy acted in this way recently. See *Law Students' Journal*, Feb. 1897, p. 24.

(*e*) See Indermaur's *Principles of Common Law*, 7th ed. 392.

(*f*) *Annual Practice*, (1897) 522, notes to Order xxii. r. 22.

with such variations as circumstances may render necessary (*g*), and required to be answered by him upon oath. These interrogatories can now, in all cases, only be delivered by leave of the Court or a Judge, and only one set of interrogatories can be delivered to the same party except by special order. The interrogatories must have a note at the foot stating which of such interrogatories the party is required to answer. On the application for leave to administer interrogatories the proposed interrogatories must be submitted, and in deciding whether they shall be allowed the Judge must take into account any offer which shall be made to deliver particulars, or to make admissions, or to produce documents, and leave is to be given as to such only of the interrogatories as the Judge shall consider necessary for disposing fairly of the action, or for saving costs (*h*). Any interrogatories may be set aside on the ground that they have been exhibited unreasonably or vexatiously, or may be struck out on the ground that they are prolix, oppressive, unnecessary, or scandalous, and any application for this purpose may be made within seven days after service of the interrogatories (*i*); and in addition to this, without any application, the costs of improper or unnecessarily lengthy interrogatories may be disallowed by the Court or a Judge, or by a Taxing Master (*j*). If a party to an action is a body corporate or joint stock company, the opposite party may apply for leave to administer interrogatories to any member or officer of such corporation or company (*k*).

Interrogatories may only be administered by leave.

The proposed interrogatories must be submitted.

Striking out or disallowing interrogatories.

Where a corporation or company is a party.

An application to strike out interrogatories as being in some way improper, is properly only made where the

Objections to interrogatories.

(*g*) Order xxxi. r. 4; Form No. 6 in Appendix B to Rules of 1883.

(*h*) Ibid. rr. 1, 2. Formerly (before 1893) in actions of fraud or breach of trust, interrogatories could be administered without leave.

(*i*) Ibid. r. 7. *Oppenheim v. Sheffield* (1893), 1 Q. B. 5; 62 L. J. Q. B. 167; 67 L. T. 606.

(*j*) Ibid. rr. 3, 7.

(*k*) Ibid. r. 5.

whole of the interrogatories are objected to. If a party only objects to answer some one or more of several interrogatories, on the ground that it or they is or are scandalous or irrelevant, or not *bonâ fide* for the purposes of the action, or that the matters inquired into are not sufficiently material at that stage of the action, or on any other ground, it is not necessary or proper to take out a summons to strike the same out, but the objection should be taken in the affidavit in answer (*l*).

Answers to
interrogatories.

Interrogatories must be answered by affidavit to be filed within ten days (*m*), and if such affidavit exceeds ten folios it must be printed (*n*). If the party claims any privilege from answering any question (*o*), it, and the grounds of it, should be stated in the affidavit, and generally if the party interrogated omits to answer any interrogatory within the proper time, or the interrogating party considers he has answered the same insufficiently, no formal exceptions are taken, but the proper course is to apply by summons in Chambers, requiring the party interrogated to answer, or to answer further, as the case may be, or a *viva voce* examination may be ordered (*p*).

Answers used
at trial.

The answers to interrogatories are afterwards frequently used at the trial, and in such event any one of the answers may be used as evidence by itself, but if

(*l*) Order xxxi. r. 6; and see *Gay v. Labouchere*, 4 Q. B. D. 206; 48 L. J. Q. B. 479.

(*m*) Ibid. r. 8. If, however, interrogatories are delivered without the delivery at the same time of a copy of the receipt for payment in of deposit for security (as to which see post, p. 110), the time for answering them runs only from the date of the subsequent delivery of the copy of the receipt. Order xxxi. r. 26. *Jones v. Jones*, W. N. (1884) 17; 19 L. J. (N.) 73.

(*n*) Ibid. r. 9.

(*o*) As to cases of privilege, see Indermaur's Principles of Common Law, Part III. ch. ii. See also fully as to the grounds on which discovery can be resisted, Annual Practice (1897), notes to Order xxxi. r. 1, pp. 623-635.

(*p*) Order xxxi. rr. 10, 11. As to consequence of neglect to obey an order to answer, see post, p. 109.

the Judge considers the answers all so connected that one ought not to be used without the other or others, he may direct them all to be put in (*q*).

Discovery of documents may be obtained by a party to an action, by applying by summons, without filing any affidavit in support thereof, asking for an order that any party to the action make an affidavit of the documents which are or have been in his possession or power, relating to the matters in question in the action. The Judge may either refuse or adjourn the summons if satisfied that such discovery is not necessary, or not necessary at that stage of the action, or may make such order either generally or limited to certain classes of documents, and no order is to be made if the Judge is of opinion that it is not necessary for disposing fairly of the action or for saving costs (*r*). A form of affidavit of documents will be found in Appendix II., (*rr*) to which, for a clear understanding of the matter, the reader is referred; and by reference to it, it will be seen that if the party claims that he is privileged from producing any documents either by reason of ordinary privilege, or on the ground that the documents are not relevant to the case of the applicant, he must distinctly state it (*s*). It will not suffice to deny that the documents will tend to prove the case, nor will the Court be bound by an affidavit of want of relevancy, but if it sees from the materials before it that the documents are relevant it will order an inspection; except, however, in such cases, the denial on oath of the possession of the documents, or of their relevancy, is generally conclusive. Ordinarily, a party cannot interrogate as to documents, but is bound by his opponent's affidavit of documents, and cannot obtain an order for a further and better affidavit; but he may

Discovery of documents.

Privilege.

Interrogatory as to documents not allowed.

(*q*) Order xxxi. r. 24.

(*r*) Ibid. r. 12.

(*rr*) Post, p. 306.

(*s*) Where privilege is claimed for any document the Court or Judge may inspect the document for the purpose of deciding as to the validity of the claim of privilege. (Order xxxi. r. 19.)

Application as regards certain specific documents.

do so in some exceptional cases, as where there is something in the affidavit or schedule thereto which will enable the Court to say it cannot rely on it. In other words, before a further affidavit can be called for, a reasonable suspicion of the correctness of the former one must be raised from the affidavit itself, from the documents therein referred to, or from admissions in the pleadings (*t*). It is, however, now provided that, even if an affidavit of documents has been made, a party may, on affidavit of his belief that the opposite party has or has had certain specific documents in his possession, apply for an order for the opposite party to state by affidavit whether any one or more specific documents is, are, or have been in his possession or power, and what has become thereof (*u*).

Who may obtain discovery, and against whom it may be obtained.

Not only may discovery, whether of facts or documents, be obtained by plaintiff against defendant, and *vice versa*, but it may be obtained by and against any parties between whom there is some right to be adjusted in the action; thus, in some cases a defendant may obtain discovery against another defendant, and also against a third party, who in his turn may also obtain discovery (*v*). And where the agent of a principal resident abroad sued in his own name on a contract made by him as agent, the defendant was held entitled to discovery to the same extent as if the principal were a party to the action (*w*). It was formerly held that discovery (of either facts or documents) could not be obtained from an infant party to an action (*x*), nor from

(*t*) *Nicholls v. Wheeler*, 17 Q. B. D. 101; 55 L. J. Q. B. 231; *Morris v. Edwards*, 23 Q. B. D. 287; 58 L. J. Q. B. 545; 61 L. T. 149.

(*u*) Order xxxi. r. 19a. Such an application would rarely be acceded to when an affidavit of documents has already been made.

(*v*) *Shaw v. Smith*, 18 Q. B. D. 197; 35 W. R. 188; *Eden v. Wear-dale Iron Co.*, 34 Ch. D. 233.

(*w*) *Willis v. Baddeley* (1892), 2 Q. B. 324; 61 L. J. Q. B. 769; 67 L. T. 206.

(*x*) *Mayor v. Collins*, 24 Q. B. D. 361; 59 L. J. Q. B. 199; 62 L. T. 326; *Curtis v. Munday* (1892), 2 Q. B. 178; 40 W. R. 317.

the next friend of an infant plaintiff (*y*), nor from the guardian of an infant defendant (*z*), but this has now been altered, and discovery can be obtained from any of such parties (*a*). In penal actions a plaintiff is not allowed to interrogate a defendant for the purpose of showing that the defendant has subjected himself to penalties (*b*).

Inspection of documents is usually obtained in the following manner: The party requiring inspection gives to his opponent a notice in writing to produce to him any documents mentioned in a pleading or affidavit of his (*c*). The other party on receipt of this notice should within two days, if the documents are all specified in his affidavit of documents, or within four days if not so specified, deliver a notice stating a time within three days at which the documents may be inspected at his solicitor's office; or, in the case of banker's books or other books of account, or books in constant use for the purposes of any trade or business, at their usual place of custody, and stating which (if any) of the documents he objects to produce, and on what ground (*d*). If the notice to produce for inspection is not complied with in this way, the party not complying will be prevented from giving such documents in evidence, unless he shows the Court that he had sufficient cause for not complying therewith (*e*). In addition to this an application may be made by summons asking for an order for inspection, and an order may be made thereon for inspection in such place, and in such manner, as the Judge may think fit (*f*). If in any case documents of which in-

Inspection of
documents.
Notice.

Appointment
to inspect.

(*y*) *Lawton v. Elwes*, 52 L. J. Ch. 399; 48 L. T. 425.

(*z*) *Ingram v. Little*, 11 Q. B. D. 251; 31 W. R. 85.

(*a*) Order xxxi. r. 29.

(*b*) *Hobbs v. Hudson*, 25 Q. B. D. 232; 59 L. J. Q. B. 562; 63 L. T. 215.

(*c*) Order xxxi. r. 15. See Form of Notice given in Appendix II. hereto, post, p. 307.

(*d*) *Ibid.* r. 17. See Form of Notice given in Appendix II. hereto, post, p. 307.

(*e*) *Ibid.* r. 15.

(*f*) *Ibid.* r. 18.

Summons for inspection when possession of documents not admitted.

spection is sought do not appear in any pleading or affidavit of the party, the only course is to apply for an order for inspection, for the Court has a general power to order the production of any document upon oath at any time (*g*); but in this case the application must be supported by an affidavit by some person showing (1) of what documents inspection is sought; (2) that the party applying is entitled to inspect; and (3) that they are in the possession or power of the other party (*h*). The Court may also, as has been already noticed (*i*), on the application of any party, and whether an affidavit of documents shall have been made or not, order a person to state by affidavit whether any specific document or documents is, or are, or have been, in his possession. Any such application must be supported by affidavit, stating the deponent's belief that the party has or has had such documents (*j*). Under special circumstances an order may be made for the deposit in Court of any document (*k*).

Ordering copies of entries in business books to be delivered instead of producing the books.

It is now provided that where inspection of any business books is applied for, the Court or a Judge may, instead of ordering inspection of the original books, order a copy of any entry or entries therein to be furnished and verified by the affidavit of some person who has examined the copy with the original entry or entries, and such affidavit must state whether or not there are in the original books any and what erasures, interlineations, or alterations. But notwithstanding such copy has thus been supplied, the Court or Judge may order inspection of the book from which the copy was made (*l*).

Order for discovery not necessarily granted as of course.

An order for discovery is not necessarily granted as of course, and the Court or Judge may, if satisfied that

(*g*) Order xxxi. r. 14.

(*i*) Ante, p. 106.

(*k*) *Leslie v. Cave*, 35 W. R. 515.

(*h*) Ibid. r. 18.

(*j*) Order xxxi. r. 19a.

(*l*) Order xxxi. r. 19a.

the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the action, or that for any other reason it is desirable that any issue or question in the cause or matter should be determined before deciding upon the right to discovery or inspection, order that the same be determined first, and reserve the question as to the discovery or inspection (*m*).

Where an order has been obtained for a party to answer interrogatories, or for discovery of documents, or inspection, and such order has been duly served (*n*), and the party fails to obey the order, he is as a consequence liable to attachment, and also, if a plaintiff, to have his action dismissed for want of prosecution, and if a defendant, to have his defence struck out, and to be placed in the same position as if he had not defended (*o*). To ground an application for attachment under this rule, the service of the order need not be personal, as is necessary to ground an application for attachment in other cases, but service on the party's solicitor is sufficient, unless the party against whom the application is made can show that he has had no notice or knowledge of the order (*p*), and in that case the solicitor himself is liable to attachment unless he has reasonable excuse (*q*).

In any action against or by a sheriff in respect of any matter connected with the execution of his office, the Court or a Judge may, on the application of either party, order that the affidavit to be made in answer either to interrogatories or to an order for discovery of documents, shall be made by the officer actually concerned (*r*).

(*m*) Order XXXI. r. 20.

(*n*) The memorandum required to be endorsed on certain judgments and orders by Order XLI. r. 5 (post, pp. 165, 166), must be endorsed on an order for discovery. *Hampden v. Wallis*, 26 Ch. D. 746; 54 L. J. Ch. 83; 32 W. R. 808.

(*o*) Order XXXI. r. 21.

(*p*) Ibid. r. 22.

(*q*) Ibid. r. 23.

(*r*) Ibid. r. 28.

Costs of
discovery.

Security for
discovery.

Amount to be
paid into
Court.

Service of
receipt.

Dispensing
with payment
in.

The costs of discovery are only to be allowed when such discovery shall appear to the Judge at the trial, or, if no trial, to the Court or a Judge, or in any event to the Taxing Master, to have been reasonably incurred (s). In addition, it is provided that any party seeking discovery by interrogatories shall, before the delivery thereof, pay into Court to a separate account in the action, to be called "Security for Costs Account," to abide further order, the sum of £5, and if the number of folios exceeds five the further sum of 10s. for every additional folio. Any party seeking discovery otherwise than by interrogatories shall, before applying for it, pay into Court in like manner the sum of £5, or such further sum as may be ordered (t), and the discretion of ordering increased security is not limited to the time of making the order, but may be exercised at any time when the circumstances show that further security is properly required (u). The payment in is made on the simple request of the party desiring to so pay in, such request containing a statement that the money is paid in to security for costs account (v). An official receipt is given for the payment in, and the party seeking discovery must with his interrogatories or order for discovery, serve a copy of the receipt for the money so paid in, and the time for answering or making discovery only commences to run from the date of such service, and a party is not required to answer or make discovery unless and until such payment has been made, unless otherwise ordered (w). The Court or a Judge may on special grounds—*e.g.*, extreme poverty—dispense with this payment into Court, but not on mere inclination, and it cannot be dispensed with merely by consent (x).

(s) Order xxxi. r. 25.

(t) *Ibid.* r. 26.

(u) *Cook v. Smith* (1891), 1 Ch. 509; 60 L. J. Ch. 573; 64 L. T. 18.

(v) Supreme Court Funds Rules, 1894, r. 32.

(w) Order xxxi. r. 26. *Jones v. Jones*, W. N. (1884) 17; 19 L. J. (N.) 73.

(x) *Newman v. London and South-Western Railway Co.*, 24 Q. B. D. 454; 59 L. J. Q. B. 341; 62 L. T. 390. *Aste v. Stumore*, 13 Q. B. D.

Where interrogatories are delivered to, or discovery of documents sought against several defendants who are being sued in respect of one cause of action, separate deposits in respect of each defendant are not required, but one deposit is sufficient in the same way as if there were but one defendant; but where there are different defendants defending by separate solicitors and each having independent rights, or where separate and distinct sets of interrogatories are delivered to each, a separate deposit must be made in respect of each defendant. As regards a defendant applying for discovery against co-plaintiffs, one deposit is always sufficient (*y*). Unless the Court or a Judge shall at or before the trial otherwise order, the amount so paid in as aforesaid is, after the action has been finally disposed of, paid out to the party who paid it in, on his request, or to his solicitor on such party's written authority, in the event of the costs of the action being adjudged to him; but in the event of the Court or Judge ordering him to pay the costs of the action, the amount in Court is subject to a lien for the costs ordered to be paid to any other party (*z*). A direction for payment out of money standing to the "Security for Costs Account," is issued by the Paymaster on receipt of a certificate of a Taxing Officer, or Master, as the case may be, to the person who is entitled to have paid out to him the money so lodged (*a*).

Where discovery sought against several parties.

Dealing with the money so paid in.

How money obtained out of Court.

An application that is not unfrequently made in the course of an action, is for the plaintiff or defendant to be ordered to give further and better particulars of his claim (*b*), or defence, as the case may be, and such order may be made on such terms as to costs or

Summons for particulars.

326; 53 L. J. Q. B. 32; 32 W. R. 219. *Burr v. Hubbard*, W. N. (1883) 198.

(*y*) Annual Practice (1897), 663, 664, notes to Order xxxi. r. 26.

(*z*) Order xxxi. r. 27.

(*a*) Supreme Court Funds Rules, 1894, r. 44.

(*b*) As to the Judge ordering particulars where action proceeding without pleadings, see Order xviii. rr. 3, 4, ante, pp. 70, 71.

Time for
pleading when
particulars
ordered.

otherwise as may be just (*c*). Thus, for instance, if the plaintiff is suing an omnibus company for injuries done to him by the negligent driving of one of the defendants' drivers, particulars may be obtained of the time and place of the accident, and of the injuries complained of, and of the expenses and other damage caused the plaintiff. The party at whose instance particulars have been delivered under a Judge's order has, unless the order otherwise provides, the same length of time for pleading after the delivery of particulars that he had at the return of the summons, but except to this extent an order for particulars does not, unless it contains a direction to that effect, operate as a stay of proceedings or give any extension of time (*d*).

Particulars in
action of
seduction.

In an action for seduction the defendant is not entitled to an order for particulars of the time and place of seduction, until he has first put in a defence denying the seduction, unless he supports his application by an affidavit stating that he intends to deny it (*e*).

Summons to
refer to
Master, &c

When an action consists entirely, or mainly, of matters of account, a very proper application is for it to be referred, on the ground that it cannot be conveniently gone into at the trial (*f*), and if this application is not made, as it should be if the action is really a matter of account, it may be referred by the Judge at the trial. The Arbitration Act, 1889 (*g*), confers very wide powers of referring matters to an official or

(*c*) Order XIX. r. 7. See *Roselle v. Buchanan*, 16 Q. B. D. 656 ; 55 L. J. Q. B. 376. As to delivery of particulars in the first instance, see Order XIX. r. 6, ante, pp. 74, 75.

(*d*) Ibid. r. 8. It has, however, been held that where upon an application for extension of the time for delivering a pleading, an order "peremptory" (see as to the meaning of this, ante, p. 97) has been made for delivery of the pleading within a time limited by the order, the time continues to run notwithstanding that the applicant subsequently obtains an order for particulars (*Falck v. Axthelm*, 24 Q. B. D. 174 ; 59 L. J. Q. B. 161).

(*e*) *Knight v. Engel*, 61 L. T. 780.

(*f*) See post, ch. vi. on "Arbitration," p. 182.

(*g*) 52 & 53 Vict. c. 49, ss. 13-15.

special referee either for report or for trial, and this without consent in any matters requiring prolonged examination of documents or accounts, or any scientific or local investigation (*h*).

Where in any action of contract the claim indorsed on the writ is for a fixed liquidated sum (*i*) not exceeding £100, or where, though it originally exceeded £100, it is reduced by payment or admitted set-off (*j*), or otherwise, to a sum not exceeding £100, either party may at any time, if the whole or part of the demand of the plaintiff is contested, apply for an order for the action to be tried in any County Court in which the action might (without or with leave (*k*)) have been commenced, or in any Court convenient thereto, and it is provided that an order shall be made unless there is good cause to the contrary. This provision applies notwithstanding that the defendant sets up a counter-claim, and even although it is for unliquidated damages (*l*) and beyond the jurisdiction of the County Court (*m*). But where the plaintiff's claim in the action is disposed of there is no jurisdiction to remit the defendant's counter-claim to a County Court (*n*). An order being made to remit, the plaintiff lodges the original writ and the order with the County Court Registrar, who appoints a day for hearing and gives notice thereof, and then the action

Summons to
refer to County
Court.

(*h*) See fully hereon Order xxxvi. rr. 43-55, and post, ch. vi. on "Arbitration," p. 182.

(*i*) *Bassett v. Tong* (1894), 2 Q. B. 332; 63 L. J. Q. B. 653; 71 L. T. 16.

(*j*) These words apply to payment or set-off before action brought, and not to payment into Court (*Skinner v. De Faria*, 33 Solrs. J1. 254), nor to payment of part of the claim on a judgment under Order xiv. (*Hodgson v. Bell*, 24 Q. B. D. 525; 59 L. J. Q. B. 231; 62 L. T. 481). As to an admitted set-off, that means admitted by both parties (*Hubbard v. Goodley*, 25 Q. B. D. 156; 59 L. J. Q. B. 285; 62 L. T. 736).

(*k*) *Burkill v. Thomas* (1892), 1 Q. B. 99; 65 L. T. 758.

(*l*) *Guildford v. Lambeth* (1895), 1 Q. B. 92; 64 L. J. Q. B. 95; 71 L. T. 738.

(*m*) *Morgan v. Bullen*, 11 Times Law Reports, 153.

(*n*) *Reg. v. Judge of City of London Court* (1891), 2 Q. B. 71; 60 L. J. Q. B. 575; 64 L. T. 869.

and all proceedings therein are tried and taken in such Court as if the action had been originally commenced therein, and the High Court has no longer any jurisdiction over it (*o*). The costs of the parties in respect of proceedings subsequent to the order are to be allowed according to the County Court scale, but the costs of all proceedings prior to the order according to the High Court scale (*p*). If in an action thus transferred to the County Court the plaintiff recovers less than £20 he is entitled to no costs (*q*).

Summons to
change place
of trial.

It has been stated that the plaintiff in his statement of claim, when there is one, mentions the place where he proposes that the action should be tried, and in other cases gives notice of such place, and that in default the trial will be in Middlesex (*r*). An application may always be made to change the place of trial; if made on the part of the plaintiff it will usually be granted on his paying the costs of the application, unless the defendant shows some good ground against changing it, for with the plaintiff rested the right of choice in the first instance. But the application is more usually made on the part of the defendant, and in support of his application he must show either that to change it in the way he proposes will be more convenient and a saving of expense, or that by reason of local prejudice, or otherwise, he cannot obtain a fair trial in the place where it is proposed that the trial should take place (*s*).

Summons to
dismiss for
want of
prosecution.

When a plaintiff does not take some step in an

(*o*) *Harris v. Judge* (1892), 2 Q. B. 565; 61 L. J. Q. B. 557; 67 L. T. 19. By 56 & 57 Vict. c. 37 (Liverpool Court of Passage Act, 1893), sect. 3, if the action is one that might have been commenced in the Liverpool Court of Passage, an order may be made for the action to be tried in such Court.

(*p*) 51 & 52 Vict. c. 43, sect. 65.

(*q*) *White v. Cohen* (1893), 1 Q. B. 580; 62 L. J. Q. B. 254; 68 L. T. 308.

(*r*) Ante, p. 77.

(*s*) See Order xxxvi. r. 1.

action within the time allowed for that purpose, a summons may frequently be taken out by the defendant asking that the action may be dismissed for want of prosecution. The chief cases in which such an application can be made are: (1) Where the plaintiff does not, when it is necessary, within the time allowed deliver his statement of claim (*t*); (2) Where he omits to obey an order to answer interrogatories or for discovery of documents (*u*); (3) Where he omits to give notice of trial within the proper time (*v*).

An application to arrest a defendant in the course of an action—or, as it is called, to hold a defendant to bail—is sometimes though not very often made. By the Debtors Act, 1869 (*w*), it is provided that, where the plaintiff proves at any time before final judgment by evidence on oath to the satisfaction of a Judge (1) that he has good cause of action against the defendant to the amount of £50 or upwards; (2) that there is probable cause for believing that the defendant is about to quit England unless he is apprehended; and (3) that the absence of the defendant from England will materially prejudice him (the plaintiff) in the prosecution of his action, the Judge may order such defendant to be arrested and imprisoned for a period not exceeding six months, unless and until he has sooner given the prescribed security, not exceeding the amount claimed in the action, that he will not go out of England without the leave of the Court. Where the action is for a penalty, or sum in the nature of a penalty, other than a penalty in respect of any contract, it is not, however, necessary to prove that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action, and the security given (instead of being that the

Application to
hold defendant
to bail.

(*t*) Order xxvi. r. 1; ante, p. 76.

(*u*) Order xxxi. r. 21; ante, p. 109.

(*v*) Order xxxvi. r. 12; post, p. 132.

(*w*) 32 & 33 Vict. c. 62.

defendant will not go out of England) is to the effect that any sum recovered against the defendant in the action shall be paid, or that the defendant shall be rendered to prison (*x*).

Order made
ex parte.

An order to arrest under this provision is made *ex parte*, but the defendant may at any time after arrest apply to the Court or a Judge to rescind or vary the order, or to be discharged from custody, or for other

Security given
by defendant.

relief (*y*). The security given by the defendant may be a deposit in court of the amount mentioned in the order for arrest, or a bond to the plaintiff, by the defendant and two sureties, or, by special leave, of one surety, or, with the plaintiff's consent, any other form of security.

Objections to
sureties.

The plaintiff may within four days after receiving particulars of the names and the addresses of the proposed sureties, give notice that he objects thereto, stating in the notice the particulars of his objection, and in such case the sufficiency of the security is determined by a Master, who has power to award costs to either party. It is the duty of the plaintiff to obtain an appointment for this purpose, and, unless he does so within four days after giving notice of objection, the security is deemed sufficient (*z*). Unless otherwise ordered, the costs of and incidental to an order of arrest are costs in the cause (*a*).

Costs of
arrest.

Summons to
remove action
from district
registry to
London.

When an action has been commenced in a district registry (*b*), either party may at any time take out a summons for it to be removed to London, and the Judge may in his discretion make an order removing it (*c*). In the following cases also a defendant may remove such an action as a matter of right—viz., (1) Where the writ is specially indorsed, and the plaintiff

When such
removal may
be made as of
right.

(*x*) Compare this with the subject of the writ of *ne exeat regno* and the case of *Drover v. Beyer*, dealt with post, p. 236.

(*y*) Order LXIX. r. 1.

(*z*) Ibid. r. 3.

(*a*) Ibid. r. 5.

(*b*) As to which see ante, pp. 16, 17.

(*c*) Jud. Act, 1873, s. 64, 65; Order xxxv. r. 16.

has not within four days after appearance given notice of an application under Order XIV. (*d*), the defendant may so remove it after the expiration of such four days, and before delivering a defence, and before the expiration of his time for doing so; (2) Where the plaintiff has made an application under Order XIV. and failed, the defendant may so remove it after the order giving him leave to defend, and before delivering a defence, and before the expiration of his time for doing so; and (3) Where the writ is not specially indorsed the defendant may so remove it after appearance and before delivering his defence, and before the expiration of his time for doing so (*e*). When an action may be so removed of right, the removal is effected by the defendant or his solicitor serving upon the other parties to the action, and delivering to the district registrar, a notice signed by himself or his solicitor, to the effect that he desires the action to be removed to London, and the action is removed accordingly. If, however, the defendant giving such notice is merely a formal defendant, or has no substantial cause to interfere in the action, the Court or a Judge may order the action to proceed in the district registry notwithstanding such notice (*f*). The notice of removal must be accompanied by a certificate, signed by the defendant or his solicitor, that his defence has not been delivered, and that the time for delivering it has not expired (*g*). Mode of removal.

Where an action is removed from a district registry, the defendant must upon its removal give notice to the plaintiff of an address for service in London in all respects as if the appearance had originally been entered in London (*h*); and where an action commenced in a district registry is by any means proceed- Notice after removal.
Transmission of proceedings.

(*d*) As to which see ante, p. 66.

(*e*) Order xxxv. r. 13. This rule does not apply to proceedings commenced by Originating Summons. *Re Thwaites, Yerburch v. Aston*, 63 L. T. 747.

(*f*) Order xxxv. r. 14.

(*g*) Ibid. r. 15.

(*h*) Ibid. r. 18; ante, p. 56.

ing in London, it is the duty of the district registrar to transmit to the Central Office all original documents filed in the district registry, and a copy of all entries of the proceedings in the books of the district registry (*i*).

Removal from
London to a
district
registry.

Any party to a cause or matter proceeding in London may apply for an order to remove the cause to any district registry, and the Court or Judge may make an order accordingly if satisfied that there is sufficient reason for doing so, upon such terms, if any, as shall be just (*j*).

Security for
costs.

A summons is often taken out in the course of an action asking that the plaintiff may be ordered to give security for costs. Such an application must be made before issue joined, and the defendant does not waive his right to have security by taking any step in the action, as by obtaining an order for time to deliver his defence or the like, with knowledge of the ground for it, provided he apply before issue joined. The mere fact that the plaintiff is a pauper is no ground for getting security, and the following are the chief cases in which the order for security will be made (*k*):

1. Plaintiff
abroad.

(1) Where the plaintiff is permanently resident abroad, out of the jurisdiction of the Court (*l*), even though he may be temporarily resident within the jurisdiction (*m*). If, however, there are several plaintiffs and one of them is resident here, though the others may be abroad, security will not generally be ordered. A mere temporary absence is not sufficient, nor is an involuntary absence, as in the case of persons

(*i*) Order xxxv. r. 20.

(*j*) Ibid. r. 17.

(*k*) See *herson Arch. Pr.* 14th ed, 395-403.

(*l*) Prior to 31 & 32 Vict. c. 54, s. 5, an order for security would have been made against a plaintiff resident in Scotland or Ireland, but not so now, as by that Act provision is made enabling a person obtaining a judgment, to register it in Scotland or Ireland and levy on it there.

(*m*) Order LXV. r. 6a.

engaged abroad in the public service. The order for security will be made even although the plaintiff is a king of a foreign state (*n*), but it will usually be an answer to the application to show that the plaintiff is in possession of substantial property within the jurisdiction—whether that property be real or personal—(*o*) available to process by the defendant; and it may also be mentioned that an order for security will not be made when there has been a direct admission by the defendant of his liability (*p*), but the mere fact that the action is brought upon a judgment already obtained abroad is no ground for refusing security (*q*).

A defendant residing abroad cannot ordinarily be compelled to give security for costs; but where the defendant is *quasi* a plaintiff, as in an interpleader issue (*r*), and he resides abroad, he may be compelled to find security for costs; and where a defendant abroad sets up, by way of counter-claim, a distinct cause of action against the plaintiff, he may be compelled to give security in respect of the costs of the counter-claim (*s*).

Ordering defendant to give security.

An application for security for costs on the ground of the plaintiff residing abroad may be founded upon the plaintiff's own admission in his writ to that effect, or on affidavit showing that it is so. An affidavit of mere belief of the plaintiff's residence being abroad is not sufficient (*t*).

Evidence to support application.

(2) In any action of tort, on an affidavit that the plaintiff has no visible means of paying his (the

2. Action of tort brought by a pauper.

(*n*) *Otho, King of Greece v. Wright*, 6 Dowl. 12; *Emperor of Brazil v. Robinson*, 5 Dowl. 522.

(*o*) *Hamburgher v. Poetting*, 47 L. T. 249; 30 W. R. 769.

(*p*) *De St. Martin v. Davis*, W. N. (1884) 86.

(*q*) *Crozat v. Brogden* (1894), 2 Q. B. 30; 63 L. J. Q. B. 325; 70 L. T. 525.

(*r*) *Tomlinson v. Land Finance Co.*, 14 Q. B. D. 539; 53 L. J. Q. B. 561.

(*s*) *Lake v. Haseltine*, 55 L. J. Q. B. 205.

(*t*) *Gardiner v. Harris*, 8 L. R. Ir. 352.

defendant's) costs in the action if he fail, the defendant may, unless the plaintiff can satisfy the Judge that he has a cause of action fit to be prosecuted in the High Court, obtain an order for him to give security for such costs, or that it be remitted for trial to a County Court to be therein named, in which case the action and all proceedings therein are to be tried and taken in such Court as if the action had been originally commenced therein, and the costs of all parties in respect of the proceedings subsequent to the order are allowed according to the scale of costs in use in County Courts, and the costs of the proceedings prior to such order are allowed according to the scale in use in the High Court (*u*). This provision forms, naturally, a very great protection to a defendant in a speculative action of tort, enabling him to get the action cheaply and quickly disposed of. It should be observed that it does not apply to a defendant setting up a counter-claim founded on tort, and this even although the issue raised by the counter-claim is the only issue for trial in the action (*v*).

3. Plaintiff bankrupt.†

(3) The trustee of a bankrupt plaintiff may be ordered to give security for costs when he interferes in an action commenced by the bankrupt, and continues it for the benefit of his estate (*w*). The mere fact that a trustee in bankruptcy who is suing is insolvent, or that he sues in his official name as "The Trustee in Bankruptcy of A. B.," is not sufficient to entitle the defendant to compel him to find security for costs (*x*), and, in fact, the insolvency or bankruptcy of the

(*u*) 51 & 52 Vict. c. 43, s. 66. By 56 & 57 Vict. c. 37 (Liverpool Court of Passage Act, 1893) sect. 4, if the action is one which might have been brought in the Liverpool Court of Passage, an order may be made for the action to be tried in such Court.

(*v*) *Delobel Flipo v. Varty*, (1893) 1 Q. B. 663; 62 L. J. Q. B. 398; 68 L. T. 797.

(*w*) 15 & 16 Vict. c. 76, s. 132.

(*x*) *Pooley's Trustee v. Whetham*, 28 Ch. D. 38; 54 L. J. Ch. 182; 33 W. R. 423; *Cowell v. Taylor*, 31 Ch. D. 84; 55 L. J. Ch. 92.

plaintiff is in itself no ground for applying for security (*y*).

(4) A limited joint-stock company will be ordered to give security for costs, if it can be shown that if the defendant is successful the assets may be insufficient to pay his costs (*z*), or if it is in course of liquidation (*a*). 4. Limited Company.

(5) If an insolvent person sues merely as a nominal plaintiff for the benefit of a third party, he may be ordered to give security for costs (*b*). 5. Nominal plaintiff.

When security for costs is ordered, it may be either a deposit of money in court, or a bond given to the party requiring the security, in such amount as the Court or Judge may direct (*c*). The day on which an order for security for costs is served, and the time thenceforward, until and including the day on which such security is given, is not reckoned in the computation of time allowed to plead, answer interrogatories, or take any other proceedings in the action (*d*). An order for security may give liberty to apply to increase the security, and if a party makes default in giving security as directed, he may be ordered to give security within a limited time, and that in default the action may be dismissed (*e*). How security given, time, &c.

The process of interpleader occurs where claims are made by two or more persons against another who Interpleader.

(*y*) *Rhodes v. Dawson*, 16 Q. B. D. 548; 55 L. J. Q. B. 134; *Cook v. Whellock*, 24 Q. B. D. 658; 59 L. J. Q. B. 329; 62 L. T. 675.

(*z*) 25 & 26 Vict. c. 89, s. 69.

(*a*) *Pure Spirit Co. v. Fowler*, 25 Q. B. D. 235; 59 L. J. Q. B. 537; 63 L. T. 559.

(*b*) *Cowell v. Taylor*, 31 Ch. D. 34; 55 L. J. Ch. 92.

(*c*) Order LXV. r. 6, 7. Generally as to cases in which security for costs will be ordered, see Annual Practice (1897), 1151-1156, notes to Order LXV. r. 6. If the sum fixed is less than £10, payment into Court is usually directed.

(*d*) Order LXIV. r. 6.

(*e*) *La Grange v. McAndrew*, 4 Q. B. D. 210.

claims no interest in the subject-matter of the dispute himself other than for costs or charges, and the object of the process is to have the point of who is entitled, decided between the antagonistic claimants (*f*).

Two cases of
interpleader.

The cases in which interpleader arises are two—viz. (1) where a person is under liability for any debt, money, goods, or chattels for or in respect of which he is or expects to be summoned by two or more parties making adverse claims thereto; and (2) where conflicting claims are made on a sheriff in possession (*g*). It is not necessary that the title of the claimants should have had a common origin (*h*). When the applicant is a defendant to an action, the interpleader summons may be taken out at any time after service of the writ of summons, and the Court or a Judge may stay all further proceedings in the action (*i*). When there is no action, then the interpleader forms the subject of an originating summons.

Affidavit in
support of
interpleader
summons.

On the hearing of an interpleader summons it is provided that the applicant must satisfy the Court or a Judge by affidavit or otherwise (1) That he claims no interest in the subject-matter in dispute other than for charges or costs; (2) That he does not collude with any of the claimants; and (3) That he is willing to pay or transfer the subject-matter into court, or to dispose of it as the Court or a Judge may direct (*j*). In the case, however, of a sheriff's interpleader, there is no necessity for him to make an affidavit in support of

(*f*) The practice as to interpleader is now regulated by Order LVII., the statutes relating to the subject being repealed, except sect. 17 of 23 & 24 Vict. c. 126, as to which see post, p. 124. Under the rules of 1883, the Masters have full jurisdiction in interpleader, save only the settlement of issues, except by consent. (See Order LIV. r. 12, enumerating the various matters in which a Master has not jurisdiction, ante, p. 21, note (*s*)). A District Registrar has power now to make interpleader orders (Order XXXV. rule 5a, being new Rule of August 1894).

(*g*) Order LVII. r. 1.

(*h*) Ibid. r. 7.

(*j*) Ibid. r. 2.

(*i*) Ibid. rr. 4, 5, 6.

the application, and he will not be allowed the costs of such an affidavit unless he has been required by the Master or District Registrar to make it (*k*).

The most frequent cases of interpleader are by sheriffs, for, on an execution being put in, a claim is often made to the goods by some party—*e.g.*, a bill of sale holder. Any claim must be made in writing, and on receipt of it the sheriff must give notice to the execution creditor, who must within four days give notice to the sheriff that he admits or disputes the claim. If he does not do this, and the claimant does not withdraw his claim by notice in writing, the sheriff may apply for an interpleader summons to be issued. If the execution creditor, before the summons is issued, gives notice admitting the claimant's title, he is only liable for fees and expenses incurred prior thereto. If after the issue of the summons an admission or withdrawal is made, the Judge may, on the return of the summons, make such order as to costs and fees as may be just and reasonable (*l*).

Sheriff's cases most frequent, and practice thereon.

An interpleader summons calls the parties before the Judge, and he may order that a claimant be made a defendant in any action already commenced in respect of the matter, or he may direct an issue to be stated and tried between the parties (*m*); or with the consent of both claimants, or on the request of any claimant, if, having regard to the value of the subject-matter in dispute, it seems desirable so to do, he may dispose of the merits of their claims, and decide the same in a summary manner, and on such terms as may be just (*n*). Where also the question is one of law, and the facts are not in dispute, the Court or a Judge may summarily decide the question, or order that a special case be stated for the opinion of the

Procedure on hearing of summons.

(*k*) *Stocker v. Heggerty*, 67 L. T. 27.

(*l*) Order LVII. rr. 16, 17.

(*m*) *Ibid.* r. 7.

(*n*) *Ibid.* r. 8.

No appeal.

Court (*o*). If any claimant does not appear on the summons, or if he neglects to comply with any order made after appearance, an order may be made barring his claim (*p*). It is provided by statute that the judgment in any such action or issue as may be directed, and any decision in a summary manner, shall be final and conclusive (*q*). The Rules of Court also provide that no appeal is to be allowed from any judgment or summary decision in interpleader, unless by special leave of the Court or a Judge, or the Court of Appeal (*r*). This provision does not, however, control the enactment just referred to, and, therefore, from a summary decision by a Judge at chambers there is no appeal, and no power to give leave to appeal (*s*). With regard, however, to a Master's decision, this does not apply, for there is certainly an appeal here, by leave, to the Judge (*t*), and possibly without leave, though this must be considered doubtful (*u*).

Sale of goods on interpleader.

In the case of a sheriff's interpleader, where any claimant alleges that he is entitled under a bill of sale, or otherwise, to the goods or chattels by way of security for a debt, the Court or a Judge may order the sale of the whole or a part thereof, and direct the application of the proceeds of the sale in such manner and upon such terms as may be just (*v*).

General practice.

The ordinary practice as to discovery (*w*) and

(*o*) Order LVII. r. 9. As to a special case, generally see Order xxxiv. and post, p. 125.

(*p*) Order LVII. r. 10.

(*q*) 23 & 24 Vict. c. 126, s. 17; 39 & 40 Vict. c. 59, s. 20.

(*r*) Order LVII. r. 11.

(*s*) *Lyon v. Morris*, 19 Q. B. D. 139; 56 L. J. Q. B. 378; 57 L. T. 324; *Re Tarn* (1893), 2 Ch. 280; 62 L. J. Ch. 564; 68 L. T. 311.

(*t*) *Webb v. Shaw*, 16 Q. B. D. 658; 55 L. J. Q. B. 249; 54 L. T. 16.

(*u*) *Clench v. Dooley*, 56 L. T. 122. See Order LIV. r. 21, and Annual Practice, (1897) 1045.

(*v*) Order LVII. r. 12. As to the duty of the sheriff, see *Scarlet v. Hanson*, 12 Q. B. D. 213, 53 L. J. Q. B. 62.

(*w*) Order xxxi.; ante, pp. 102-111.

Transfer to
County Court.

Party to a special case under disability.

(e) Ibid. r. 4.

Agreement as
to special case.

The parties to any such special case may, if they think fit, enter into an agreement in writing, which is not subject to any stamp duty, that on the judgment of the Court being given in the affirmative or negative of the question or questions raised by the special case, a sum of money fixed by the parties, or to be ascertained by the Court, or in such manner as the Court shall direct, shall be paid by one of the parties to the other or others of them, either with or without costs of the action; and the judgment of the Court may be entered for the sum as agreed or ascertained, with or without costs, as the case may be, and execution may issue after such judgment forthwith, unless otherwise agreed, or unless stayed on appeal (*f*).

Issues of fact
without
pleadings.

In addition to a special case there is another course that may be adopted instead of the ordinary mode of procedure, and that is, where the parties to an action are agreed as to the questions of fact to be decided between them, they may by consent and order of the Judge proceed to the trial thereof without formal pleadings—viz., by means of an issue to be entered and tried in the same manner as an issue in an ordinary action (*g*).

Costs on
interlocutory
applications.

On some interlocutory applications a direction is given as to the costs of the application—*e.g.*, that they are to be paid by one of the parties, that they are to be “costs in the cause,” or are to be one of the parties’ costs “in any event.” The meaning of the expression “costs in the cause,” is simply that the costs of the application follow the general costs of the action, which indeed is usually the case. The meaning of the expression costs “in any event” is that one of the parties is to have the costs of the application in question, whatever may be the ultimate result of the action. Upon any interlocutory applica-

“Costs in
cause.”

Party’s costs
“in any event.”

f) Order xxxiv. r. 6.

g) Ibid. rr. 9–12.

tion where the Court or a Judge shall think fit to award costs to any party, payment may be directed of a certain sum in lieu of taxed costs (*h*).

Where an application is made in Chambers to one of the Masters, or to a District Registrar, he may, if he thinks fit, refer the matter to a Judge in Chambers (*i*). If he does not, nevertheless, any person affected by his order or decision, may appeal to a Judge in Chambers within four days in the case of a Master's decision, and within six days in the case of a District Registrar's decision, such appeal being by way of indorsement on the summons by the Master, or District Registrar, at the request of any party, or by notice in writing to attend before the Judge without any fresh summons (*j*). From thence either party may appeal to a Divisional Court within eight days by motion (*k*), unless it is a matter of practice or procedure (*l*), in which case the appeal must be to the Court of Appeal within fourteen days (*m*), and subject also to this, that there is no appeal from an order allowing an extension of time for appealing from a judgment or order, and that leave to appeal must be obtained from a Judge, or the Court of Appeal, except in the cases mentioned below (*n*). As regards the one case of a summons under Order XIV., there is an

Appeals from
decisions in
Chambers.

Judicature
Act, 1894.

(*h*) Order LXV. r. 23.

(*i*) Order LIV. r. 20; Order XXXV. r. 8.

(*j*) Order LIV. r. 21; Order XXXV. r. 9. See also *ante*, p. 17.

(*k*) Order LIV. rr. 23, 24.

(*l*) As to what has been held to be "practice or procedure," see Annual Practice, (1897) 150, 151.

(*m*) Order LVIII. r. 15. Unless, indeed, the order appealed from happened to be a final order, when the time would be three months. As to what orders are Interlocutory and what are Final, see Annual Practice (1897), 1073, note to Order LVIII. r. 15.

(*n*) Judicature Act, 1894, s. 1. The exceptions are: (1) When the liberty of the subject or the custody of infants is concerned; (2) Cases of granting or refusing an injunction or appointing a receiver; (3) Any decision determining the claim of any creditor or the liability of any contributory or director or officer under the Companies Acts, 1862 to 1890; (4) Any decree nisi in a matrimonial cause, and any judgment or order in an admiralty action determining liability; (5) Any order on a special case stated under the Arbitration Act, 1889; (6) Such other cases to be prescribed by Rules of Court as in the opinion of the authority for making such rules are of the nature of final decisions.

appeal from a Judge, without leave, if the Judge has refused unconditional liberty to defend (*o*). An appeal notice, when the appeal is to a Judge or a Divisional Court, must be made returnable within the times above mentioned (*p*); but when the appeal is to the Court of Appeal it seems sufficient to merely give the notice within the prescribed time. The times for appealing are subject to enlargement or abridgment by the Court or Judge, and this even though the application for enlargement is not made until after the expiration of the proper time (*q*). Any such appeal as aforesaid is no stay of proceedings unless so ordered (*r*).

Notice of proceedings after lying by for one year.

When there has been no proceeding taken in an action for one year, the party, whether plaintiff or defendant, who desires to proceed must first give a calendar month's notice to the other party (*s*). Thus where the plaintiff obtained an order for judgment, but allowed more than a year to expire without signing judgment thereon, it was held that he could not sign judgment until after a month's notice (*t*). But where judgment has been signed execution can be issued without notice though more than a year has expired (*u*). A summons on which no order is made is not, but notice of trial countermanded is, deemed a proceeding within the Rule (*v*). The term "month" occurring here, and generally in legal procedure, means a calendar month (*w*).

"Month."

Discontinuance or withdrawal of plaintiff's claim or part thereof.

A plaintiff not desiring to continue his action may at any time before receipt of the defendant's statement

(*o*) Judicature Act, 1894, s. 1.

(*p*) *Stedman v. Hakin*, 22 Q. B. D. 16; 58 L. J. Q. B. 57.

(*q*) Order LXIV. r. 7.

(*r*) Order LIV. r. 22.

(*s*) Order LXIV. r. 13.

(*t*) *Staffordshire Joint Stock Bank v. Weaver*, W. N. (1884) 78.

(*u*) *Taylor v. Roe*, 62 L. J. Ch. 391; 68 L. T. 253. After six years, however, execution can only be issued by leave. See post, p. 154.

(*v*) Order LXIV. r. 13.

(*w*) *Ibid.* r. 1.

of defence, or after the receipt thereof before taking any other proceeding in the action (save an interlocutory application), by notice in writing, wholly discontinue his action, or withdraw any part or parts of the alleged cause of complaint, but he must then pay the defendant's costs of the action, or, if the action be not wholly discontinued, the defendant's costs occasioned by the matter so withdrawn. Such costs are taxed and such discontinuance or withdrawal, as the case may be, is not a defence to any subsequent action. Subject to this it is not competent for the plaintiff to withdraw the record or discontinue the action without leave of the Court or a Judge, but the Court or a Judge may, before or at or after the hearing or trial, upon such terms as to costs, and as to any other action, and otherwise as may seem fit, order the action to be discontinued, or any part of the alleged cause of complaint to be struck out. The Court or a Judge may, in like manner and with the like discretion as to terms, upon the application of a defendant, order the whole or any part of his alleged ground of defence or counter-claim to be withdrawn or struck out, but it is not competent to a defendant to withdraw his defence or any part thereof without such leave (x).

Subsequent action may be brought.

Discontinuance or withdrawal of defendant's counter-claim or defence.

Any defendant may enter judgment for the costs of the action if it is wholly discontinued against him, or for the costs occasioned by the matter withdrawn if the action is not wholly discontinued, in case such respective costs are not paid within four days after taxation (y); and if any subsequent action is brought before payment of the costs of a discontinued action, for the same, or substantially the same, cause of action, the Court or a Judge may if they or he think fit order

Judgment for costs after discontinuance.

Staying subsequent action.

(x) Order xxvi. r. 1. See also as to countermand of notice of trial, Order xxxvi. r. 19, post, p. 135.

(y) Order xxvi. r. 3.

a stay of such subsequent action, until such costs shall have been paid (z).

Compounding
penal action.

Leave is necessary to compound a penal action, and such leave is not to be given where part of the penalty goes to the Crown, unless notice shall first have been given to the proper officer. Any order to compound a penal action must expressly state that the defendant undertakes to pay the sum for which the Court has given him leave to compound the action, and where part of the penalty goes to the Crown, that portion must be paid into the hands of the Master of the Crown Office Department of the Central Office for the use of Her Majesty (a).

Commercial
causes.

It is convenient here to notice the special practice now existing in commercial causes, a notice having been issued by the Judges as regards them, under their general right to deal by convention amongst themselves with the mode of disposing of the business of their Courts. Commercial causes include causes arising out of the ordinary transactions of merchants and traders, amongst others those relating to construction of mercantile documents, export or import of merchandise, affreightment, insurance, banking, mercantile agency, and mercantile usage. Either party to an action may apply by summons to enter a case in the Commercial list, and a separate list of summonses in commercial cases is kept in Chambers, and a separate list is also kept for entry of such causes for trial. A particular Judge is charged with commercial business, and all applications in London are made to him direct, and as regards country cases, this can be so also by consent. With regard, however, to applications under Order XIV., they are made, as heretofore, to a Master or District Registrar. Even when a cause

(z) Order xxvi. r. 4.

(a) Order L. rr. 13, 14, 15.

has been entered for trial in the ordinary list, application may be made to enter the same in the Commercial list. Provisions have also been made to facilitate a speedy hearing—*e.g.*, in proper cases dispensing with pleadings and also with technical rules of evidence, and generally for enabling a decision on the real matter in controversy to be quickly given (*b*).

(*b*) See the Judges' Notice as to Commercial Causes set out in vol. ii. of Annual Practice, (1897) 392, 393.

CHAPTER V.

TRIAL AND PROCEEDINGS TO CONCLUSION.

HAVING in the last Chapter considered the most usual interlocutory applications and proceedings in the course of an action, we may now continue its ordinary course, which we have at present pursued up to the close, of the pleadings (*a*), and the next thing is to go to trial.

Notice of trial The first step towards the trial is to give notice of trial. As has been pointed out (*b*), a plaintiff may, if he desires, indorse his writ with a notice that he intends to proceed to trial without pleadings, and then if the defendant appears he may, subject to a contrary order being made, proceed to give twenty-one days' notice of trial, within ten days of appearance. But, subject to this, notice of trial may be given by the plaintiff with his reply (if any) whether it closes the pleadings or not, or at any time after the issues of fact are ready for trial (*c*). Such notice must state whether it is for the trial of the action or of issues therein, and the place and day for which it is to be entered for trial (*d*). If the plaintiff does not give notice of trial within six weeks after the close of the pleadings the defendant may then give notice of trial, or may apply to have the action dismissed for want of prosecution (*e*).

(*a*) See ante, p. 90.

(*b*) Ante, pp. 70, 71.

(*c*) Order xxxvi. r. 11.

(*d*) Ibid. rr. 13, 13a. See form in Appendix II. hereto, post, p. 308.

(*e*) Ibid. r. 12.

There are four possible modes of trial, and the rules with regard to trial appear equally to apply whether the new procedure of summary trial is adopted, or the notice of trial is given with or subsequently to reply :

First Mode—Before a Judge with a Jury.—In cases of slander, libel, false imprisonment, malicious prosecution, seduction, and breach of promise of marriage, the plaintiff may give notice of trial in this way, and if he gives notice of trial otherwise than with a jury, the defendant may within four days from service of notice of trial give notice that he requires a jury, and thereupon the action is to be so tried. (*f*). In other cases notice of trial for, or notice requiring, a jury cannot be given ; but it is provided that upon the application of any party within ten days after notice of trial given (*g*), for a trial with a jury, an order *shall* be made for the same (*h*). Every trial with a jury is by a single Judge, unless it is specially ordered to be by two or more Judges (*i*).

Second Mode—Before a Judge alone without a Jury.—In actions not falling within the first mode of trial, subject to the provisions presently mentioned, the trial is by a Judge alone (*j*). The Court or a Judge may also, if it appears desirable, direct a trial without a jury of any question or issue of fact, or partly of fact and partly of law, which previously to the passing of the Judicature Acts could without any consent of parties (*k*).

(*f*) Order xxxvi. r. 2.

(*g*) This means within ten days of the original notice of trial, so that where the notice of trial had become of no force by reason of non-entry within the proper time (see post, p. 135) an application made within ten days of a second notice was refused. (*Tonsley v. Heffer*, 19 Q. B. D. 153 ; 50 L. J. Q. B. 650 ; 57 L. T. 481).

(*h*) Order xxxvi. r. 6. This rule does not, however, give any right to a jury in cases which, under the former practice could, without consent, be tried without a jury ; but in such cases the Court has a discretion (*Annual Practice* (1897), 710) ; and it does not apply to matters assigned to the Chancery Division, which are always to be tried by a judge without a jury unless otherwise ordered (Order xxxvi. r. 3, post, p. 193).

(*i*) *Ibid* r. 9.

(*j*) *Ibid*. 1. 7.

(*k*) This mainly comprises Chancery matters.

have been tried without a jury (*l*), and also of any question or issue requiring any prolonged examination of documents or accounts, or any scientific or local investigation which cannot conveniently be made with a jury (*m*).

3rd mode of trial.

Third Mode—Before an Official or Special Referee.—No notice can be given for trial in this way, but an order to that effect may be made (*n*).

4th mode of trial.

Fourth Mode—By a Judge or Official or Special Referee with Assessors.—No notice can be given for trial in this way, but an order to that effect may be made (*o*).

Trial of different issues in different ways and at different times.

Subject to the foregoing provisions, the Court or a Judge may in any action order that different questions of fact arising therein be tried by different modes of trial, or that one or more questions of fact be tried before the others, and may appoint the place for such trials, and in all cases may order that one or more issues of fact be tried before any other or others (*p*).

Length of notice.

The length of the notice of trial is ten days, unless the defendant is under terms to take short notice, when it is four days (*q*), but when the plaintiff has duly indorsed his writ with notice that he intends to proceed to trial without pleadings, then the notice is a 21 days' notice (*r*). When the defendant is under terms to take short notice of trial, it is nevertheless usual to give as long a notice as the time will admit of, but this is not absolutely necessary, unless the order only puts him on terms to take short notice if necessary.

(*l*) Order xxxvi. r. 4.

(*m*) Ibid. r. 5.

(*n*) See ante, p. 27 and chap. vi. post, p. 182, and generally Order xxxvi. rr. 53–55.

(*o*) Ibid. and generally Order xxxvi. rr. 43–45.

(*p*) Order xxxvi. r. 8.

(*q*) Ibid. r. 14. As to which, see ante, p. 97.

(*r*) Order xviii. And see ante p. 70.

If this is the case the defendant is not bound to take short notice unless it becomes necessary, and it is not necessary if the plaintiff has been guilty of delay in joining issue or giving the notice (s). The notice of trial in London or Middlesex does not operate for any particular sittings, but is deemed to be for the first day on which the cause can be reached after the expiration of the notice; elsewhere than in London or Middlesex it is deemed to be for the next assizes at the place for which notice of trial is given (t). No notice of trial once given can be countermanded, except by consent in writing signed by the parties or by leave of the Court or a Judge (u). Countermand.

Notice of trial having been given, the next step is to enter the cause for trial. In London or Middlesex this entry must be made within six days after giving the notice (v). The party giving the notice should enter it either on the day of the notice or the day after; if, however, he does not, his opponent may enter it within the four subsequent days, and if within that time neither party enters it the notice of trial falls through (w). Elsewhere than in London or Middlesex either party may, not less than seven days before the Commission day appointed for such place, enter the cause for trial in the district registry (if any) of the city or town where the trial is to be held, or with the associate, and no later entry is allowed except by leave of a Judge going that circuit, or by order of a Judge at Chambers subject to the consent of a Judge going that circuit (x). If both plaintiff and defendant enter the cause for trial, it is tried in the order of the plaintiff's entry, and the defendant's entry is vacated (y). On Entry of cause for trial in London or Middlesex.

(s) Arch. Pr. 14th ed. 578.

(t) Order xxxvi. rr. 17, 18.

(u) Order xxxvi. r. 19. Order xxvi. r. 2. (v) Order xxxvi. r. 16.

(w) Ibid rr. 16, 20.

(x) Ibid. r. 22b. Order xxxvi. r. 23, also provides that so long as certain assize towns therein named have no District Registry, actions to be tried therein may be entered at certain specified District Registries.

(y) Order xxxvi. r. 28.

entering the cause, two sets of the pleadings (if any) must be lodged for the use of the Judge (*z*). If no pleadings two copies of the writ are lodged, and in any event if any particulars have been delivered two copies of such particulars are lodged.

Regulations as
to trial of
causes.

With regard to causes entered for trial in London or Middlesex, separate printed lists are now made of special and of common jury actions, and general provisions have been made for denoting to the parties the time when the particular action is likely to be reached (*a*). In the list the general nature of each action is stated in the margin, and if the pleadings do not exactly represent the true nature of the action, the solicitor who enters the cause for trial must give on the outside of the statement of claim some short indication of the real question which is for trial (*b*). As regards applications under Order XIV., as has been already explained (*bb*), a special list is kept for the trial of causes in which liberty to defend has been given, and in which the Judge is of opinion that a prolonged trial will not be requisite (*c*). This is usually styled the Short Cause list. In addition, there is a regulation existing (though practically it is never taken advantage of) to the effect that as to non-jury cases, whenever the solicitors to the parties agree, and counsel for the plaintiff certifies that in his opinion the trial will not exceed half an hour, the cause will, on application to a Judge, be put into a list of Short Causes, and taken on some particular day to be fixed for the purpose (*cc*).

Short causes.

(*z*) Order xxxvi. r. 30.

(*a*) Regulations issued October 1888, Nos. 1-11, 13, 16. See Annual Practice, (1897) vol. ii. 392.

(*b*) Ibid. No. 12.

(*bb*) Ante, pp. 68, 69.

(*c*) Order xiv. r. 8.

(*cc*) Regulation of October 1888, No. 14. See Annual Practice, (1897) vol. ii. 392. Care should be taken not to confuse "Short Causes" in the Queen's Bench Division and the practice of "Short Causes" in the Chancery Division, which is in constant use. See post, pp. 200, 201.

The next thing to be done by the parties is to prepare for the trial, and a very ordinary course is to lay a case before counsel to advise on the evidence to be adduced at the trial. In the preparation for trial two notices that are usually given in actions should be observed—viz., a notice to produce documents at the trial, and a notice to inspect and admit documents.

Preparation
for trial.

A notice to produce is a notice given, by either plaintiff or defendant, calling upon any other party to the action to produce certain documents at the trial (*d*). A form of such notice is given in the Appendix II. hereto (*dd*); its object is that if the other party does not produce any documents in accordance with it, the party giving the notice may give secondary evidence of their contents by copies or otherwise, which he would not be entitled to do if such notice had not been given (*e*). If any such notice comprises documents which are not necessary, the costs occasioned thereby are to be borne by the party giving such notice (*f*).

Notices to
produce.

Its object.

A notice to inspect and admit is simply a notice given in a like way, but calling on the other party to come and inspect certain documents at a certain time and place, and admit them, so as to save the expense of calling witnesses to prove them at the trial (*g*). A form of this notice is also given in the Appendix II. (*gg*); and if it comprises any documents not necessary, the costs thereof are to be borne by the party giving such notice (*h*). If the other party neglects or refuses to admit the documents, the costs of proving them at the trial will have to be paid by him whatever the result of the action may be, unless at the trial the Court certify that the refusal to admit was reasonable. No costs of proving any documents are allowed unless this notice is given, except where

Notices to
inspect and
admit.

Its object.

Advisability of
giving such
notices.

(*d*) Order xxxii. r. 8.

(*dd*) Post p.

(*e*) See Indermaur's Principles of Com. Law, Part III. ch. ii.

(*f*) Order xxxii. r. 9.

(*g*) Ibid. r. 2.

(*gg*) Post, pp. 308, 309.

(*h*) Ibid. r. 9.

the omission to give it has been, in the opinion of the taxing officer, a saving of expense. The party, if he admits the documents, only admits them saving all just exceptions, which means that he does not thereby preclude himself in any way from contesting the validity of any document, or objecting to it on the ground of its not being stamped or otherwise (*i*). When documents are admitted, an affidavit of the solicitor or his clerk of the due signature of the admission, which is annexed to his affidavit, is sufficient (*j*).

Briefs, &c.

Before the day of the trial briefs are prepared on behalf of the respective parties to the action, containing a statement of the case of the party on behalf of whom the brief is given, and a list of the witnesses to be called on his behalf, and particulars of what each witness will prove; also notes as to the cross-examination of any witness expected to be called on the other side, and generally a brief should contain all such information as may be useful to counsel. A copy of the brief, the pleadings, any notices to produce, and to inspect and admit, and to admit facts, and any other necessary documents, are delivered to each counsel employed on behalf of the particular party. Sometimes only one counsel is employed, sometimes two or more, according to the importance of the case; most usually there are two, a Queen's Counsel and a junior. However, it is now provided that in actions of contract where not more than £50 is recovered, the costs of briefing more than one counsel shall not be allowed unless the Taxing Master shall for special reasons be of opinion that briefing more than one counsel was proper (*k*). When it is proper to have two counsel

Papers to be given to counsel.

As to more than one counsel.

(*i*) Order xxxii. r. 2.

(*j*) Ibid. r. 7. The student should be very careful not to confuse this notice to inspect and admit given above, with the notice to produce for inspection which may be given in the course of an action. The latter has for its object only the inspection of the documents in the course of the action, see ante, p. 107. He should also carefully observe the notice for admission of facts, ante, p. 89.

(*k*) Order xlv. r. 27 (46).

they may be selected from the outer bar if the party thinks fit (*l*). A retainer to counsel is not allowed in a party and party taxation (*m*). Usually also before the trial a consultation or conference is arranged, so that counsel may be as far as is possible conversant with the facts, and any special points may be discussed. Fees are of course paid with the briefs, and for the consultation or conference, and if the case is not reached at the sittings or assizes for which the brief is delivered, a fee called a refresher fee is also paid, as is also the case if the trial of the action occupies more than one day (*n*). Fees to counsel should be reasonable, and with regard to refreshers the following definite provision has been made—viz.: If the trial extends over more than one day, and occupies either on the first day only, or partly on the first and partly on a subsequent day or days, more than five hours without being concluded, the Taxing Master may allow for every clear day subsequent to that on which the five hours have expired, to the leading counsel from five to ten guineas, to the second, if three counsel, three to seven guineas, and to the third, if three counsel, or the second, if only two, three to five guineas. In a solicitor and client taxation, however, the Taxing Master has power to allow larger refreshers if he thinks fit, under special circumstances to be stated by him (*o*). Fees for counsels' clerks are still allowed and are specially

Consultation
or conference.

Refreshers.

Amounts of
refreshers.Fees to counsels'
clerks.

(*l*) Order XLV. r. 27 (47).

(*m*) Ibid. r. 27 (44).

(*n*) This applies to all divisions of the Court and to the Court of Appeal. (*Svensden v. Wallace*, 16 Q. B. D. 27; *Easton v. London Joint Bank*, 38 Ch. D. 25.)

(*o*) Order LXV. r. 27 (48). As to when refreshers are payable it appears to be now settled (though, I would submit, contrary to the plain wording of the rule) that the proper way to interpret the rule is as follows: A period of five hours is equivalent to a full day's work. Irrespective, therefore, of days of the week, the first day of a case within the rule is the first five hours, and the second day of a case begins at the end of that time; the only exception would be that if the court sat more than five hours on the first day, the extra time on that day would be held to be part only of that day. (*O'Hara v. Elliott*, (1893) 1 Q. B. 362; 62 L. J. Q. B. 317; 68 L. T. 166. See Annual Practice, (1897) 1196.)

regulated (*p*). No fee to counsel is now allowed on taxation unless vouched by his signature (*q*).

Evidence. The evidence at the trial is taken *viva voce*, unless otherwise agreed or ordered, and it is provided that any particular fact may be ordered to be proved by affidavit (*r*).

Subpœnas, and as to witnesses generally. The attendance of witnesses at the trial is enforced by means of subpœnas. A subpœna is a writ by which a person is commanded to appear at a certain place and time, and is either a writ of *subpœna ad testificandum* where a witness is simply required to give his oral testimony, or a *subpœna duces tecum* where, in addition, he is required to bring with him certain stated documents relating to the matters in question (*s*), and these writs are according to certain forms (*t*). Three names are to be inserted in each *subpœna ad testificandum* where necessary or required, but it may contain any number of names (*u*), but no more than three names may be included in one *subpœna duces tecum*, and the party suing out the same is at liberty to sue out a *subpœna duces tecum* for each person if it shall be deemed necessary or desirable (*v*). A copy of the subpœna must be served personally on each witness, the original being shewn at the same time (*w*), and service must be made within twelve weeks of the date of the writ, otherwise it ceases to be of any validity (*x*). Subpœnas also only remain in force till the end of the Sittings or Assize for which they were issued, and a

Subpœna ad testificandum.

Subpœna duces tecum.

Number of names in one subpœna.

Service of subpœna and how long in force for.

(*p*) Order LXX. r. 27 (51).

(*q*) Ibid. (52).

(*r*) Order XXXVII. r. 1. See provision as to agreement to take evidence by affidavit, post, pp. 194, 195. See also Jud. Act, 1894, sect. 3, empowering rules to be made as to the means of proving particular facts, and Order XXX. r. 7, which is the only rule made thereunder. See also as to evidence in Commercial causes, ante, pp. 130, 131.

(*s*) Brown's Law Dict. 2nd ed. tit. "Subpœna, writ of," p. 511. *The Emma Silver Mine*, L. R. 10 Ch. 194.

(*t*) Order XXXVII. r. 27, and Appendix J. to Rules of 1883.

(*u*) Order XXXVII. r. 29.

(*v*) Ibid. r. 30.

(*w*) Ibid. r. 32.

(*x*) Ibid. r. 34.

new subpoena must afterwards be issued, or instead the former subpoena may be altered as to date and sitting or assize, and reissued as a new writ (*xx*). It is usual on serving a subpoena to inform the witness he need not attend until he receives notice to do so, and afterwards to give the witness notice when the cause is coming on. A reasonable sum must be paid to each witness to defray his expenses of appearing on his subpoena, and he is justified in refusing to attend or to give evidence until his proper expenses are paid (*y*). If a material witness who has been properly served and to whom a reasonable sum for expenses has been paid or tendered, does not obey his subpoena, he is liable to attachment and also to an action for damages. If a witness is resident in Scotland or Ireland a subpoena cannot be issued as a matter of course, but only by leave of the Court or a Judge. If a witness is in Her Majesty's dominions abroad, a writ may be issued in the nature of a mandamus to the tribunals there for the examination of the witness, or instead, and also in all cases where a witness is out of England, a commission may be issued for the examination of the witness there, or if the Court or a Judge shall so order, there may be issued a request to examine witnesses in lieu of a commission (*z*). With regard to witnesses in Her Majesty's dominions abroad, when any commission, mandamus, order, or request is issued to the Court or a Judge of a Court abroad, such Court, or the chief Judge thereof, or such Judge, may nominate some fit person to take the examination, and any such witness may be examined on oath, affirmation, or otherwise, according to the law in force in the place where the examination is taken (*a*). If a person who is required as a witness is in custody on civil process, his evidence is obtained by

Conduct
money.

Witness in
Scotland or
Ireland.

Witness
abroad.

Witnesses in
custody.

(*xx*) Practice Masters' Rules, No. 14 in Annual Practice, (1897) 1228.

(*y*) *Re Working Men's Society*, 21 Ch. D. 831; 51 L. J. Ch. 850; 30 W. R. 938.

(*z*) Order xxxvii. r. 6a.

(*a*) 48 & 49 Vict. c. 74. ss. 2, 6.

his being brought up on *habeas corpus ad testificandum*, which is granted by a Judge in Chambers, but if in custody otherwise than on civil process, an order to bring him up to give evidence must be obtained from one of the principal Secretaries of State, or a Judge at Chambers (*b*).

Taking
evidence
de bene esse.

It sometimes happens that a person who will be required as a witness at the trial is about to go abroad, or is so ill that he is in danger of death, or through extreme age is likely to die before trial. In any such case an order may be obtained for the examination of such witness before an officer of the court, or some other person (*c*). In support of the summons for such an order it must be shewn by affidavit that the party is a material witness, and that he is about to go abroad, or that he is very old (*d*), or is dangerously ill, and in this latter case there must be an affidavit of the illness by a medical man. The evidence so taken cannot be used at the trial (except by consent), unless it is shewn to the satisfaction of the Judge at the trial that the deponent is unable to attend (*e*). Although a summons is usually taken out for an order to take evidence in this way, in a proper case an order may be made *ex parte* (*f*).

Application
for order.

Jury.

With regard to trial by jury (*g*), the jury is most

(*b*) Arch. Pr. 14th ed. 567. Order xxxvi. r. 35. Generally as to evidence, see Order xxxvii.

(*c*) Order xxxvii. r. 5.

(*d*) The fact of a witness being over seventy years of age is *prima facie* ground (*Bidder v. Bridges*, 26 Ch. D. 1; 53 L. J. Ch. 479; 32 W. R. 445; 50 L. T. 287).

(*e*) Order xxxvii. r. 18. See Arch. Pr. 14th ed. 540.

(*f*) *Bidder v. Bridges*, *supra*.

(*g*) All persons between twenty-one and sixty are liable to serve on a jury, provided they have the necessary property qualification, as described in notes (*h*) and (*i*) (post, p. 143), and also provided they are not exempted from so serving. The chief persons exempted are peers, judges, magistrates, clergymen, doctors, barristers, and solicitors; but there are numerous other exemptions of less importance. A jurymen who has been summoned, and fails to attend, is liable to be fined. Any party who is dissatisfied with a jurymen on the ground of want of the necessary property qualification, or by reason of some supposed bias or partiality, or by reason of his being a peer, or a criminal, may object to him, which objec-

usually a common jury (*h*), but it may be a special jury (*i*). The plaintiff in any action in which he is entitled to a jury (*j*), may have a special jury upon giving notice in writing to that effect to the defendant at the time when he gives notice of trial; and the defendant in like cases may have a special jury on giving notice to that effect at any time after the close of the pleadings, or settlement of the issues, and before notice of trial, or if notice of trial has been given then not less than six clear days before the day for which notice of trial has been given. A Judge may also at any time make an order for a special jury upon such terms (if any) as to costs and otherwise as may be just (*k*). The party who obtains the special jury has to pay all the extra costs occasioned by it, whatever may be the result of the action, unless the Judge before whom the action is tried, within a reasonable time after the trial, certifies that the cause was one proper to be tried before a special jury (*l*).

When it appears advisable on account of the nature of the case, an order may be made for the jury to view the place or premises the subject of the action (*m*), and generally, it is now provided that any Judge before whom any case may be tried, either with or without a jury, or before whom any cause or matter may be brought by way of appeal, may make an order for the inspection of any property or thing concerning which

tion is called a challenge. As to challenging jurors see Stephen's Coms. 12th ed. vol. iii. p. 566. The jury are summoned to attend by the Sheriff (Arch. Pr. 14th ed. 615, 616).

(*h*) The main qualifications of a common juror are that he should have £10 a year from freeholds or copyholds, or £20 a year in leaseholds, or be a householder rated or assessed to the poor-rate, or to the inhabited house duty in Middlesex, on a value of not less than £30, or in any other county not less than £20 (Arch. Pr. 14th ed. 613).

(*i*) Special jurors are persons of a higher degree than common jurors, such as bankers or merchants (Arch. Pr. 14th ed. 614).

(*j*) As to which see ante, p. 133.

(*k*) Order xxxvi. r. 7.

(*l*) 6 Geo. IV. c. 50, s. 34.

(*m*) Arch. Pr. 14th ed. 609, 610.

any question may arise therein, and this applies to inspection by a jury (*n*).

The trial.

Procedure at trial.

Finally, the action in its due order comes on to be tried, and taking there to be two counsel on each side, it usually proceeds as follows: The plaintiff's junior counsel states shortly the effect of the pleadings, and the senior counsel states his client's case; the witnesses are then called and respectively examined by one of these counsel; cross-examined, if necessary, by counsel on the other side, and then, if necessary, re-examined on any new points which may have arisen out of the cross-examination. The plaintiff's case being closed, the defendant's senior counsel states his client's case, and, in the same way as was done by the other side, his witnesses are now called and examined, cross-examined, and re-examined. He then addresses the jury on the evidence, and the plaintiff's senior counsel replies on the whole case. The Judge then sums up, telling the jury the points on which their verdict is required; he also directs them as to the proper measure of damages should their verdict be for the plaintiff, and when they have considered the matter, they announce their verdict through the foreman they have chosen amongst themselves (*o*). If after the plaintiff's case is closed, the defendant's counsel announces that he does not intend to call any witnesses, the plaintiff's counsel must at once address the jury, and the defendant's counsel concludes with his address, thus having the last word to the jury (*p*). In the foregoing remarks it is put as if the plaintiff's counsel always commences, and so it is in the great majority of cases; but the rule is that the party to begin is he on whom the affirmative in the action lies, or, more correctly, the one who in the absence

Right to begin at the trial.

(*n*) Order L. rr. 4, 5. *Pickard v. G. N. Ry. Co.*, W. N. (1883), 194.

(*o*) In the above nothing is said about the evidence being by affidavit, because such a thing in the Queen's Bench Division is not usual, in fact never occurs. Evidence by affidavit sometimes occurs in the Chancery Division, and is dealt with post, pp. 194, 195.

(*p*) Order xxxvi. r. 36.

of proof on either side would substantially fail in the action. Thus, if an action is brought on a policy of insurance, and the defendants admit the policy and the death, but set up fraud, here it would be for the defendants to begin. In cases, however, of slander, libel, and other actions for personal injuries where the plaintiff seeks to recover actual damages of an unascertained amount, he is always entitled to begin, although the affirmative of the issue may in point of form be with the defendant, for his case must at any rate go to the jury on the question of amount (*q*).

In actions of libel or slander in which the defendant does not by his defence assert the truth of the statement complained of, the defendant is not entitled at the trial to give evidence in chief, with a view to mitigation of damages, as to the circumstances under which the libel or slander was published or uttered, or as to the character of the plaintiff, without the leave of the Judge, unless seven days at least before the trial he has furnished particulars to the plaintiff of the matters as to which he intends to give evidence (*r*).

Delivery of particulars of circumstances in actions of libel or slander.

The Judge may in all cases disallow any questions put in cross-examination of any witness, which may appear to him to be vexatious and not relevant to any matter proper to be inquired into in the action (*s*).

Disallowing questions in cross-examination.

The verdict is the unanimous decision of the jury on the facts submitted to them, and it may be a general verdict for the plaintiff, or for the defendant, or a special verdict on the questions that the Judge has thought proper to leave to the jury. If the jury cannot agree

The verdict.

(*q*) Arch. Pr. 14th ed. 627, 630.

(*r*) Order xxxvi. r. 37. As to giving notice with defence, of intention to offer apology in evidence, see 6 & 7 Vict. c. 96, s. 1. Indermaur's Principles of Com. Law, Part II. ch. 5.

(*s*) Ibid. r. 38.

on their verdict after a reasonable time, unless the parties agree to accept the verdict of a majority, they are discharged, and the action must be tried again.

Postponement
of trial.

It sometimes happens that at the trial one of the parties finds it necessary to apply for a postponement. This application may be granted on good grounds (*t*), but it is usually only acceded to on the terms that the party applying pays the "costs of the day"—that is, those costs which will have to be incurred over again on account of the postponement, such as the issuing of fresh subpoenas, refreshers to counsel, &c.

"Costs of the
day."

Withdrawing
a juror.

In the course of a trial, sometimes the parties agree that the action shall be withdrawn, and that each party shall pay his own costs. This object is accomplished by withdrawing a juror, and the action cannot then be brought over again (*u*); but though this usually ends the action, it does not necessarily do so, for the Judge still has a control over it, and under special circumstances may afterwards allow it to be tried (*v*).

Nonsuit.

A nonsuit is, technically, where the plaintiff does not appear at the trial, and the defendant succeeds by reason of his default. A nonsuit, however, more usually occurs where the plaintiff finds he cannot succeed in his action, and voluntarily submits to be nonsuited—that is, to let it be considered as if he were not present—or where the Judge considers that even on the plaintiff's own showing he cannot succeed, and therefore withdraws the case from the jury, and himself decides against the plaintiff. However, the Judge has no power to nonsuit a plaintiff against his will after merely hearing the opening statement, as the plaintiff is entitled to have his evidence heard if

(*t*) Order xxxvi. r. 34.

(*u*) Arch. Pr. 14th ed. 648.

(*v*) *Thomas v. Exeter Flying Post Co.*, 56 L. T. 361.

he so desire (*w*). A nonsuit under the old practice prior to the Judicature Act had this advantage over a verdict for the defendant—viz., that the plaintiff might bring the same action over again, so that in many cases a plaintiff would submit to be nonsuited in the hope that at the next trial he might have some additional evidence, or in some other way be better prepared. By the Rules of 1875, it was, however, provided that a judgment of nonsuit should have the same effect as a judgment on the merits for the defendant; but this provision has been repealed and is not re-enacted (*x*), but it is merely provided that if when a case is called on for trial the defendant appears and the plaintiff does not appear, the defendant, if he has no counter-claim, shall be entitled to judgment, dismissing the action (*y*), but any such judgment may be set aside upon such terms as to the Court or a Judge may seem fit upon application made within six days after the trial (*z*). If, then, it is really a case of the plaintiff not appearing, it seems that the action cannot be brought again, but an application may be made to set the nonsuit aside. If, however, the plaintiff does appear, and the Judge, considering he has no case, nonsuits him, then the position is the same as prior to the Judicature practice, and the action may be brought again (*a*).

Former
advantage of
nonsuit.

Present effect
of judgment of
nonsuit.

The effect, then, of the plaintiff not appearing at the trial while the defendant does, is that a judgment dismissing the action is entered; but in addition to this, if the defendant has any counter-claim, he may prove such claim so far as the burden of proof lies on him (*b*). If the defendant does not appear at the trial while the

Effect of
plaintiff and
defendant
respectively
not appearing
at trial.

(*w*) *Fletcher v. London and North-Western Railway* (1892), 1 Q. B. 122; 61 L. J. Q. B. 24; 65 L. T. 605.

(*x*) See Annual Practice, (1897) 206.

(*y*) The defendant need not prove service of the notice of trial. (*James v. Crow*, 7 Ch. D. 410; 47 L. J. Ch. D. 200; 7 L. T. 749.)

(*z*) Order xxxvi. r. 33.

(*a*) See hereon Annual Practice, (1897) 204–206.

(*b*) Order xxxvi. r. 32.

plaintiff does, the plaintiff may prove his claim so far as the burden of proof lies on him and obtain judgment (c), subject to it being set aside in like manner and within the like time as in the case of a judgment on non-appearance of the plaintiff (d). If neither party appears at the trial, the cause is struck out. The Court or a Judge may, if thought expedient in the interests of justice, postpone or adjourn a trial for such time or upon such terms, if any, as seem fit (e), and if the adjournment is rendered necessary by any negligence or omission of a solicitor engaged, the Court or a Judge may order such solicitor to personally pay any costs to all or any of the parties (f).

Judgment.

Judgment—that is, the sentence of the law pronounced by the Court upon the matter appearing from the previous proceedings in the action (g)—follows on the verdict, and was, until lately, obtained by motion for judgment (h); but no motion for judgment is now necessary, it being provided that the Judge shall at or after the trial direct judgment to be entered as he thinks right (i). The certificate of the Associate to the effect that the Judge has directed judgment to be entered for any party, is sufficient authority to the proper officer to enter judgment accordingly (j).

No motion for judgment now.

Course to be taken when party objects to judgment directed to be entered.

Where at or after a trial with a jury the Judge has directed that any judgment be entered, any party may apply to set the same aside and enter any other judgment, on the ground that the judgment directed to be entered is wrong by reason that the finding of the jury upon the questions submitted to them has not been

(c) Order xxxvi. r. 31.

(d) Ibid. r. 33.

(e) Ibid. r. 33.

(f) Order xlv. r. 5.

(g) See Brown's Law Dict. 2nd ed. p. 290.

(h) Order xl. r. 1. As to motions for judgment after trial of issues, see post, p. 150; and as to motion for judgment in the Chancery Division, see post, pp. 192, 193.

(i) Order xxxvi. r. 39.

(j) Ibid. r. 42.

properly entered (*k*); in addition to this, where at or after a trial by a Judge, either with or without a jury, the Judge has directed that any judgment be entered, any party may apply to set the same aside and enter any other judgment, upon the ground that upon the finding as entered the judgment so directed is wrong (*l*). The application, in either of such cases, is now made to the Court of Appeal (*m*).

The cases in which a Judge would decline to direct judgment to be entered at the trial, or in which the other party would apply to set aside the judgment, are those in which on the special facts of the case as found by the jury there is, or is considered to be, a doubt as to which of the parties is in law entitled to the judgment. In all ordinary and simple cases there is no such doubt, and judgment goes, as a matter of course, in accordance with the verdict.

Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court or a Judge, on motion or summons without an appeal (*n*). Clerical mistakes in judgments, orders, &c.

If in any action judgment is given for a person who is an infant, or of unsound mind, not so found by inquisition, the Court or a Judge may at or after the trial order that the whole or any part of the sum awarded shall be paid into court to the credit of an account intituled in the cause or matter; and any sum so paid in is to be subject to such orders as may from time to time be made by the Court or a Judge concerning the same, and may either be invested or paid out of court or transferred to such persons, to be held and applied upon and for such trusts, and in such Protection to infants, &c., in respect of money recovered.

(*k*) Order XL. r. 3.

(*l*) Ibid. r. 4.

(*m*) 53 & 54 Vict. c. 44 (Jud. Act, 1890), s. 1; Order XL. r. 5. As to motion for a new trial, see post, pp. 145-147.

(*n*) Order XXVIII. r. 11.

manner, as the Court or a Judge shall direct (*o*). Any money so paid into court or securities purchased under this provision, and the dividends or interest thereon, are to be sold, transferred, or paid out to the party entitled thereto pursuant to the order of the Court or a Judge (*p*).

Judgment
after trial of
issues.

Where issues have been ordered to be tried, or any issue of fact has been ordered to be determined in any manner, the course to obtain judgment is for the plaintiff to move for same as soon as they have been determined. If he does not set down the motion for judgment, and give notice thereof to the other parties within ten days after his right to do so has arisen, any defendant may do so (*q*).

Date of
judgment.

Any judgment pronounced by the Court or a Judge in court is dated as of the day on which it is pronounced, unless otherwise ordered, and the judgment takes effect from that date, but by special leave a judgment may be ante-dated or post-dated (*r*). After judgment the successful party, if he is entitled to his costs, proceeds to tax them, and the amount is filled in the judgment (*s*).

Judgment or
order granted
upon some
condition.

Where any person who has obtained any judgment or order upon condition, does not perform or comply with such condition, he is deemed to have waived or abandoned such judgment or order so far as the same is beneficial to himself, and any other person interested therein may, on breach or non-performance of the condition, take either such proceedings as the judgment or order may in such case warrant, or such proceedings as might have been taken if no such judgment or order

(*o*) Order XXII. r. 15.

(*p*) Ibid. r. 16. See also Supreme Court Funds Rules, 1894, rr. 46, 69-72, as to payment in and investment generally.

(*q*) Order XL. r. 7.

(*r*) Order XLI. r. 3.

(*s*) As to costs generally, see post, pp. 171-181.

had been made, unless the Court or a Judge shall otherwise direct (*t*).

An application not at all unfrequently made after New trials.
verdict is for a new trial. The following are the chief Grounds for
grounds of the application: (1) That the Judge has applying for.
misdirected the jury upon some point of law, or has
not taken their verdict upon a point he was asked at
the trial to leave to them; (2) That he has wrong-
fully admitted or rejected certain evidence; (3) That
the verdict is against the weight of the evidence;
(4) That the damages are grossly excessive; (5) That
the damages are utterly inadequate (*u*); (6) The mis-
conduct of the jury, as if they cast lots to decide the
verdict (*v*); (7) That there was some mistake, inad-
vertence, or surprise. A new trial has also been
ordered on the ground of the absence of a material
witness, upon terms of payment of the costs of the
abortive trial, and generally the Court has a wide dis-
cretion in the matter (*w*). No new trial can be granted
on the grounds above numbered (1) and (2), unless in
the opinion of the Court to which the application is
made, some substantial wrong or miscarriage has been
thereby occasioned to the trial of the action, and if it
appears to the Court that such wrong or miscarriage
affects part only of the matter in controversy, the
Court may direct a new trial as to that part only,
without in any way interfering with the finding or
decision upon any other question (*x*). With regard to
the ground given above, numbered (3), a very strong
case must be made out, and the question of granting
the application depends upon whether the verdict was

(*t*) Order XLII. r. 2.

(*u*) As to the principles guiding the Court in acting on the grounds
above numbered 4 & 5, see *Praed v. Graham*, 24 Q. B. D. 53; 59
L. J. Q. B. 230. See also Annual Practice, (1897) 788, 789, notes to
Order XXXIX. r. 6.

(*v*) See Arch. Pr. 14th ed. 730-739.

(*w*) See Annual Practice (1897) 788, 789, notes to Order XXXIX. r. 6,
p. 763.

(*x*) Order XXXIX. rr. 6, 7.

such as reasonable men ought not to have come to (*y*), and the Court will attach great importance to the point of whether the Judge who tried the cause is satisfied with the verdict or not (*z*). Therefore it follows that though when a trial has taken place before a Judge without a jury the Court has full power to grant a new trial on this ground if it sees fit, yet it will not usually do so.

To whom
application for
new trial
made and
mode of
applying.

The application for a new trial is now, whether the trial has taken place before a Judge alone or a Judge with a jury, made to the Court of Appeal (*a*). Every application for a new trial is made by notice of motion, which notice must state the grounds of the application, and whether all or part only of the verdict or findings is complained of (*b*).

Time for
applying, &c.

This notice of motion is a fourteen days' notice and must be served within the times following—viz., if the trial has taken place in London or Middlesex, within eight days after the trial, and if elsewhere within seven days after the last day of sittings on the circuits for England and Wales during which the trial shall have taken place (*c*), and the time of the vacations is not reckoned in the computation of the time for serving the notice of motion (*d*). The motion is entered in a list, and duly comes on in its turn. No Judge can sit on the hearing of such a motion in any cause tried with a jury before himself (*e*). A new trial may be ordered on any question, whatever be the grounds

(*y*) *Solomon v. Bitton*, 8 Q. B. D. 176. *Webster v. Friedeberg*, 17 Q. B. D. 736 ; 55 L. T. 49. (*z*) Arch. Pr. 14th ed. 735.

(*a*) Jud. Act, 1890, s. 1. Order xxxix. r. 1. This provision does not apply to a motion for new trial of an action tried before an Official Referee, which must still be to a Divisional Court. (*Gower v. Tobbitt*, 39 W. R. 193.)

(*b*) Order xxxix. r. 3. Before the Rules of 1883, the practice was to apply for a rule *nisi* for a new trial. This rule expressly does away with that mode of procedure.

(*c*) Order xxxix. r. 4. This means the expiration of the whole of the circuits, and not the particular one.

(*d*) Order xxxix. r. 4.

(*e*) *Ibid.* r. 1.

for the new trial, without interfering with the finding or decision upon any other question (*f*). No new trial may be granted by reason of the ruling of any Judge as to the sufficiency of the stamp upon any document, or that a document does not require a stamp (*g*).

The party applying for a new trial should obtain a copy of the Judge's notes of the evidence at the trial for the use of the Court, which he does by paying a fee and bespeaking the same of the Judge's clerk after he has served the notice of motion; and if upon any motion for a new trial, the Court considers that it has not sufficient materials before it, it may direct the motion to stand over for further consideration, and direct any issues to be tried if necessary. The Court has also power to draw all inferences of fact not inconsistent with the finding of the jury (*h*), and may, in the case of a perverse verdict, enter judgment for the party in whose favour the verdict ought to have been given (*i*). When a new trial is ordered a fresh notice of trial is given, and the action re-entered for trial, and if the plaintiff does not proceed thus within a reasonable time, a summons may be taken out in Chambers to dismiss the action for want of prosecution (*ii*).

Material
necessary on
motion for
new trial.

New notice
of trial.

The judgment being thus complete, if payment of the amount of it is not made, the next thing is to enforce it, which, in the case of an ordinary judgment for payment of money, may be done by any of the modes by which it might have been enforced prior to the Judicature Acts (*j*), the chief of which modes are presently detailed, the most usual being execution,

Steps to
enforce
judgment.

(*f*) Order XXXIX. r. 7.

(*g*) Ibid. r. 8. *Blewitt v. Tritton*, (1892) 2 Q. B. 327; 61 L. J. Q. B. 773; 67 L. T. 72.

(*h*) Order XL. r. 10.

(*i*) *Allcock v. Ball*, (1891) 1 Q. B. 444; 60 L. J. Q. B. 416; 64 L. T. 309.

(*ii*) *Roberts v. French*, 43 W. R. 258.

(*j*) Order XLII. r. 3.

Issuing
execution.

which is issued by producing to the proper officer an office copy of the judgment with a præcipe containing the title of the action, &c., and a form of writ of execution, which must be indorsed with the name of the solicitor issuing it, and if he is agent, then with the two names, and also with a direction to the sheriff or other officer or person to whom the writ is directed, to levy the amount actually due, with interest at 4 per cent. per annum from the date of the judgment, or for any higher interest that the parties may have agreed on (*k*). If after the judgment a part of the amount is paid, the body of the writ should nevertheless pursue the judgment strictly, but the indorsement must be only to levy the actual amount due. A writ of execution may be issued on an ordinary judgment for payment of money or recovery of land directly it is duly entered, and the time for payment of the money or delivery of possession has arrived, unless the Court or Judge directs it to be postponed, as may be the case (*l*); but where the judgment or order is for something other than payment of money or recovery of land, execution cannot issue until after fourteen days unless otherwise ordered (*m*). No writ of execution is allowed to issue without the production to the proper officer of the judgment or order on which it is to issue, or an office copy thereof shewing the date of entry, and such officer must be satisfied that the proper time has elapsed to entitle the creditor to execution (*n*). Execution must be issued within six years of the judgment, and before any change in the parties has occurred by death or otherwise, unless leave is obtained from the Court or a Judge to issue execution afterwards (*o*).

Time for
issuing
execution.

Execution
after six years.

(*k*) Order XLII. rr. 11-16.

(*l*) Ibid. r. 17.

(*m*) Ibid. r. 19.

(*n*) Ibid. r. 11.

(*o*) Ibid. rr. 22, 23. The following are the various cases enumerated in the Rules in which leave is necessary to issue execution: (1) Where six years have elapsed; (2) Where a husband is entitled or liable to execution upon a judgment or order for or against a wife; (3) Where a party is entitled to execution upon a judgment of assets *in futuro*; (4) Where a party is entitled to execution against any of the shareholders

The writ of execution remains in force for one year, but may be renewed for one year from the date of renewal, and so on from time to time, by the writ itself, or a notice of renewal to the sheriff, being marked with the seal of the Court bearing the date of the renewal, which is sufficient evidence thereof (*p*). In force for
one year.

A person not a party to an action may enforce any judgment or order made therein in his favour in the same way as if he were a party (*q*). Enforcing
judgment by
person not a
party to action.

The chief writs of execution that may be issued in ordinary cases are writs of *fi. fa.*, *capias ad satisfaciendum*, and *elegit*. Writs of
execution.

A writ of *fi. fa.* (shortly called a writ of *fi. fa.*), *Fieri facias.* is a writ directed to the sheriff commanding him that of the goods and chattels of the debtor he do cause to be made the sum indorsed on the writ, together with interest at 4 per cent. (*r*). The sheriff executes this writ by taking possession of the party's goods and chattels, and selling the same, which sale, if the execution, including expenses, exceeds £20, must be by public auction, advertised for three days preceding the sale, and the sheriff must keep the proceeds in his hands for fourteen days, and if bankruptcy ensues within that time, pay the proceeds to the official receiver or trustee in bankruptcy, instead of to the execution creditor (*s*). If several writs of

of a Joint Stock Company upon a judgment recorded against such Company, or against a public officer or other person representing such Company. (Order XLII. r. 23.) It should be observed that if more than twelve years have elapsed since the judgment, and there has been no payment or acknowledgment, then, by reason of the provision of the Real Property Limitations Act, 1874 (37 & 38 Vict. c. 57, s. 8), no proceedings whatever can be taken to enforce it. (*Jay v. Johnstone*, (1893) 1 Q. B. 25; 62 L. J. Q. B. 128; 67 L. T. 655.)

(*p*) Order XLII. rr. 20, 21.

(*q*) Ibid. r. 26.

(*r*) Brown's Law Dict. 2nd ed. tit. "*Fi. fa.*," p. 229.

(*s*) 46 & 47 Vict. c. 52, s. 145. He may proceed to advertise and sell directly he seizes, unless a sale would, under the circumstance, be unreasonable. (*Re Crook*, 63 L. J. Q. B. 756; 71 L. T. 236.)

fi. fa. are lodged with the sheriff and he seizes under the first, his possession enures for the benefit of all other writs of execution lodged with him according to their priorities (*t*).

Ca. sa.

Judgment
summons.

Provisions of
Bankruptcy
Act, 1883, and
Rules as to
Judgment
Summonses.

A writ of *capias ad satisfaciendum* (shortly called a writ of *ca. sa.*) is a writ of execution commanding the sheriff to seize the body of the debtor and keep it to satisfy the amount due (*u*). This writ cannot, however, now often issue, in consequence of the Debtors Act, 1869 (*v*), and, indeed, a judgment summons to some extent often takes the place of a *ca. sa.* This is a summons issued under the Debtors Act, 1869, asking that a debtor may be committed to prison, and if it is shown that he has or has had since the judgment the means to pay, an order may be made committing him to prison for a term not exceeding six weeks (*w*). Every such committal order must be absolute and immediate in its terms, but the issue of the order may be restrained for a certain time for the purpose of giving a *locus pœnitentiæ* to the defaulting party (*x*). Judgment summonses were made bankruptcy business by the Bankruptcy Act, 1883 (*y*), which provided that County Courts should have jurisdiction as regards them to any amount (*z*). All judgment summonses must be taken out in the County Court of the district where the debtor resides, unless the judgment creditor first obtains leave to issue his summons out of the High Court (*a*); or unless the amount remaining due on the judgment exceeds £50, and the judgment debtor resides or

(*t*) *Ex parte Shaw, In re Henderson*, W. N. (1884), 60.

(*u*) Brown's Law. Dict. 2nd ed. tit. "Capias ad Satisfaciendum," p. 76.

(*v*) 32 & 33 Vict. c. 62. See Indermaur's Principles of Com. Law, Part II. ch. 4.

(*w*) 32 & 33 Vict. c. 62, s. 5.

(*x*) *Stonor v. Fowle*, 13 App. Cas. 20; 57 L. J. Q. B. 387; 58 L. T. 1.

(*y*) 46 & 47 Vict. c. 52, s. 103.

(*z*) *Ibid.*

(*a*) General Rules under Bankruptcy Act, 1883, r. 265b.

carries on business within the London Bankruptcy District, when the summons may be issued in the High Court (*b*). The jurisdiction of the High Court as to judgment summonses is exercised by the Judge to whom bankruptcy business is assigned (*c*). Any order of commitment bears date on the day on which it is made, and continues in force for one year only, but may be renewed in the same manner as has been stated with regard to writs of execution (*d*).

A writ of *elegit* (*e*) is a writ of execution whereby a judgment creditor is enabled to seize his judgment debtor's lands in execution. Under it the sheriff puts the judgment creditor in possession of the lands, and he holds them until out of the profits his debt is satisfied (*f*), or after registering his execution he may apply summarily for a sale of his debtor's interest in the lands (*g*). Formerly an *elegit* applied also to goods, and under this writ the sheriff was commanded first to seize and appraise the judgment debtor's goods and deliver them to the judgment creditor at their appraised value, and then if not sufficient to seize his lands. But by the Bankruptcy Act, 1883, it is provided that the sheriff shall not under a writ of *elegit* deliver the goods of a debtor, nor shall a writ of *elegit* extend to goods (*h*). Leaseholds may, however, still be seized under an *elegit* (*i*).

It does not
now apply to
goods.

When a judgment creditor, who has been put in possession of lands under an *elegit*, has been satisfied

Mode in which
judgment
debtor can
recover back
his lands when
judgment
satisfied.

(*b*) Bankruptcy Regulation, dated 8th June, 1885.

(*c*) General Rules under Bankruptcy Act, 1883, r. 265a.

(*d*) Order XLII. r. 25. Ante, p. 149.

(*e*) It may be noticed that this writ of *elegit* has entirely superseded a former process by writ of *levari facias*, which commanded the sheriff to seize the judgment debtor's lands and chattels, and not deliver them to the judgment creditor, but collect thereout sufficient for him, and now no such writ can be issued in any civil proceeding (46 & 47 Vict. c. 52, s. 146.)

(*f*) Brown's Law Dict. 2nd ed. tit. "Elegit," p. 198.

(*g*) 27 & 28 Vict. c. 112, s. 4. See post, p. 161.

(*h*) 46 & 47 Vict. c. 52, s. 146.

(*i*) *Richardson v. Webb*, 1 Morrell's Bankruptcy Cases, 40.

out of the rents, there are various ways in which the debtor can recover back his lands, but the most proper and usual mode of proceeding is to apply to the Division out of which the *elegit* issued to refer it to one of the Masters to ascertain the amount of the rents and profits received, and to order that if it appear that the debt is satisfied, possession shall be delivered to the debtor (*j*).

Equitable
execution.

Another process of execution is what is styled equitable execution, which is effected by obtaining the appointment of a receiver, a course taken when there is no other appropriate or convenient mode of execution. Before the Judicature practice, to effect equitable execution it was necessary to file a Bill in Chancery for the appointment of a receiver, but the Judicature Act, 1873 (*k*), now provides that a receiver may be appointed by an interlocutory order in all cases in which it shall appear to the Court to be just or convenient to do so, and therefore if a judgment debtor has an equitable interest in land (which being equitable cannot be seized under an *elegit*) the proper course is to apply for the appointment of a receiver (*l*). But equitable execution does not only apply to equitable interests in land, but to other property besides, which there is no available mode of seizing in execution at law, and even if there is a mode of seizing in execution at law, provided the equitable process is more convenient. As instances it may be noticed that equitable execution has been allowed for the purpose of seizing the following interests of judgment debtors: (1) the separate estate of a married woman; (2) a fund in court payable to a judgment debtor; (3) a reversionary interest under a will; (4) a legacy; (5) income of a trust fund (*m*).

(*j*) Arch. Pr. 14th ed. 887.

(*k*) Sect. 25 (8).

(*l*) *Smith v. Cowell*, 6 Q. B. D. 75; 50 L. J. Q. B. 38; *Salt v. Cooper*, 16 Ch. D. 544; 50 L. J. Ch. 529.

(*m*) Annual Practice, (1894) 926 notes to Order L. r. 16.

But the process of equitable execution does not enable a judgment creditor to seize every kind of property or interest that a judgment debtor may possess. True, the Judicature Act, 1873, enacts that a receiver may be appointed in all cases in which it is just and convenient, but this has been held to mean that a receiver can only be appointed in cases in which a receiver could have been appointed by the Court of Chancery formerly. Thus, equitable execution cannot be used for the purpose of attaching a debtor's future salary (*n*), nor to receive the entrance fees paid by the public for admission to a theatre or other place of entertainment (*nn*), and neither by equitable execution nor by *elegit* can a legal remainder in land be made available to a judgment creditor (*o*). The judgment creditor's only course would be to make his debtor a bankrupt, when the remainder would in the bankruptcy form part of his property available for the benefit of his creditors. A reversionary interest in personalty, or in land, given to trustees in trust for sale, can be taken in equitable execution (*oo*).

Formerly it was held that an order appointing a receiver was in itself a complete seizure in execution, and that such an order appointing a receiver over land of a judgment debtor need not be registered in order to give the judgment creditor priority over a subsequent purchaser of the debtor's equity of redemption (*p*). This, however, is not so now as regards interests in land, it being provided by the Lands Charges Act, 1888 (*q*), that every order appointing a receiver by

(*n*) *Holmes v. Millage*, (1893) 1 Q. B. 551; 62 L. J. Q. B. 380; 68 L. T. 205.

(*nn*) *Cadogan v. Lyric Theatre*, (1894) 3 Ch. 338; 63 L. J. Ch. 775; 71 L. T. 8.

(*o*) *Re South*, 9 Ch. App. 369; *Hood-Barrs v. Cathcart*, (1895) 2 Ch. 411; 64 L. J. Ch. 461; 72 L. T. 583.

(*oo*) *Tyrrell v. Painton*, (1895) 1 Q. B. 202; 64 L. J. P. 33; 71 L. T. 687.

(*p*) *Re Pope*, 17 Q. B. D. 743; 55 L. J. Q. B. 522; 55 L. T. 369.

(*q*) 51 & 52 Vict. c. 51, s. 5.

way of equitable execution shall be void against a purchaser for value of land unless the order is registered in the Land Registry Office.

Practice to get equitable execution.

It is now the settled rule that an application for the appointment of a receiver by way of equitable execution must be by summons in chambers. The summons must be served on the judgment debtor, and sometimes the Judge will grant an interim injunction restraining the debtor from making away with the property in the meantime. Applications for receivers are not now as a rule granted *ex parte*, though they are in some cases of extreme urgency (*r*). The granting of the application is discretionary, and it has been laid down that an order for a receiver ought to be granted only in cases where the amount of the judgment debt warrants the expense, and also only where there is fair reason to suppose that there is something for the receiver to receive. In support of an application for the appointment of a receiver, an affidavit must be filed showing that judgment has been recovered and is still unsatisfied, and for what amount, and shewing the specific property in respect of which the receiver is intended to be appointed, for the Court will not appoint a receiver of the property of a judgment debtor generally, but only of specific property (*s*). The affidavit should, if such is the case, shew that there is no property that can be reached by means of legal execution, as this makes the case stronger. The person proposed to be appointed receiver should be mentioned, and his fitness for the post deposed to. In some cases the Court will appoint the judgment creditor himself receiver. The receiver has usually to give security, but in some cases the Court will dispense with security on the undertaking of the

Affidavit in support of application.

(*r*) *Lucas v. Harris*, 18 Q. B. D. 127; 56 L. J. Q. B. 15; 55 L. T. 658.

(*s*) *Hamilton v. Brogden*, 35 S. J. 206; Law Students' Journal, Feb. 1891, p. 34.

judgment creditor, and the receiver, not to act without order of the Court (*t*).

Any judgment creditor who has either by *elegit* or order appointing a receiver, seized his judgment debtor's interest in land may, after registering his process of execution in the Land Registry office, apply to the Chancery Division of the High Court of Justice for a summary order for sale (*u*). Any such application is now made by originating summons served on the debtor (*v*). This provision only applies to interests in land, so that a judgment creditor who has seized a reversionary interest in personalty under equitable execution cannot get an order for sale (*w*).

Obtaining order for sale of judgment debtor's interest in land seized in execution.

The Court or a Judge has power to grant discovery as an assistance towards execution by ordering that the debtor (*ww*), or in the case of a corporation any officer thereof, be orally examined as to his property and debts, and for the production of any books or documents (*x*).

Discovery in aid of execution.

The result of any writ of execution is officially given by the sheriff's return thereto, to obtain which no order is now necessary, but a notice is served at the office of the sheriff, calling upon him to return the writ within a given time (*y*).

Obtaining sheriff's return.

(*t*) See *Hewett v. Murray*, 54 L. J. Ch. 572 ; 52 L. T. 380 ; generally as to Equitable Execution, see Annual Practice, (1897) 924-927, notes to Order L. r. 16.

(*u*) 27 & 28 Vict. c. 112, s. 4. See 51 & 52 Vict. c. 51, s. 5 (4), providing now for the registration to be in the Land Registry office.

(*v*) Order LV. r. 9B.

(*w*) *Flegg v. Prentis*, (1892) 2 Ch. 428 ; 61 L. J. Ch. 705 ; 67 L. T. 107 ; *De Peyrecave v. Nicholson*, 71 L. T. 255 ; 42 W. R. 702.

(*ww*) But not other witnesses (*Hood-Barrs v. Heriot*, (1896) 2 Q. B. 338 ; 65 L. J. Q. B. 622 ; 75 L. T. 15.

(*x*) Order XLII. r. 32. If the defendant is not a corporation, the only person who can be ordered to attend for examination is the defendant himself, not his manager or any one else. (*Irwell v. Eden*, 18 Q. B. D. 538 ; 56 L. J. Q. B. 446 ; 56 L. T. 620.)

(*y*) Order LII. r. 11. This by analogy to the former practice is a four days' notice.

As other modes of enforcing a judgment, may be mentioned a garnishee order, and a charging order.

Garnishee order.

Affidavit in support of application for garnishee order.

Service of order.

A garnishee order is an order obtained by a judgment creditor (*z*) against some third party who owes money to the judgment debtor, commanding him to pay such money to the judgment creditor, in satisfaction, or part satisfaction, of his debt. It is obtained on an *ex parte* application of the judgment creditor, supported by the affidavit of himself or his solicitor, that judgment has been recovered, and to what amount, and is still unsatisfied, and that some third person within the jurisdiction is indebted to the judgment debtor (*a*); and upon this the Court, or a Judge, may order such debt to be attached, and also order the third person, who is called the garnishee, to appear and shew cause why he should not pay the judgment creditor the debt due from him to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt (*b*). Service of this order binds the debt in the garnishee's hands from that time (*c*), and if he does not pay the amount claimed into court, or dispute the debt, or appear on the summons, execution may be issued against him for the amount (*d*), and payment by him is a valid discharge to him as against the debtor (*e*);

(*z*) This term includes any person to whom money is to be paid under an order (Order LXV. r. 1). Formerly it was otherwise (*Cremetti v. Crom*, 48 L. J. (Q. B.) 337). An assignee of a judgment debt may avail himself of garnishee procedure. (*Goodman v. Robinson*, 18 Q. B. D. 332).

(*a*) The affidavit need not state the amount of the debt owing by the garnishee. (*Lucy v. Wood*, W. N. (1884) 58; 19 L. J. (N.) 154.) It is sufficient to swear to the indebtedness of the third person to the best of the deponent's information and belief, and the amount need not be stated (*Vinall v. De Pass* (1892), A. C. 90; 61 L. J. Q. B. 507). A debt due may be attached before it becomes payable, and an order made for payment when it becomes payable (*Tapp v. Jones*, 10 Q. B. 579; *Hyam v. Freeman*, 35 Sol. Jl. 87; Law Students' Jl. Jan. 1891, p. 8).

(*b*) Order XLV. r. 1.

(*c*) However, if bankruptcy ensues before actual receipt by the judgment creditor of the money from the garnishee, the judgment creditor is not in any way secured, but loses the benefit of his garnishee order (46 & 47 Vict. c. 52, s. 45).

(*d*) Order XLV. rr. 2, 3.

(*e*) Ibid. r. 7.

if, however, the garnishee disputes his liability, an issue may be directed to try the question, or it may be ordered to be tried in any way in which an action may be tried or determined (*f*). If a judgment creditor does not actually know any one who owes money to the judgment debtor, but has reason to suspect that some such debt is owing, he may obtain an order, in the first instance, for the oral examination of the judgment debtor as to whether any and what debts are owing to him, and for the production of any books or documents (*g*). The costs of garnishee proceedings are in the discretion of the Court or a Judge (*h*). A garnishee order may now be made attaching a debt due from a partnership firm by its partnership name, although one or more of the partners may be resident abroad, and the name of the individual partners need not be stated (*i*). Examination of judgment debtor. Garnishee order against a firm.

Whenever in garnishee proceedings the garnishee suggests that the debt sought to be attached belongs to some third person, or that some third person has a lien on it, the Court or a Judge may order such third person to appear and state the nature and particulars of his claim, and may direct an issue to try the right thereto (*j*). Conflicting claims in garnishee proceedings.

Actual debts only can be attached by a garnishee order—that is, the money must be such that the judgment debtor could himself have compelled payment of it; therefore, unliquidated damages cannot be attached before judgment, though the amount has been ascertained by verdict (*k*); nor can purchase money which is payable on the execution of a conveyance (*l*); nor Debts attachable.

(*f*) Order XLV. r. 4.

(*g*) Ibid. r. 1. Order XLII. r. 32.

(*h*) Order XLV. r. 9.

(*i*) Order XLVina. r. 9.

(*j*) Ibid. rr. 5, 6.

(*k*) *Jones v. Thompson*, E. B. & E. 63.

(*l*) *Howell v. Metropolitan Railway Company*, 19 Ch. D. 508; 30 W. R. 100.

Seamen's and
servant's
wages not
attachable.

can money due to a shareholder from a company in a voluntary winding up (*m*). It is also specially provided that a garnishee order cannot be obtained to attach the wages owing to any seaman (*n*), servant, labourer, or workman (*o*).

Charging
order.

A charging order is an order charging the amount of any judgment upon stocks or shares of the judgment debtor, or any money in court in which the judgment debtor has a beneficial interest (*p*). When any judgment debtor has any such property in his own right, any judgment creditor may apply for an order for the same to stand charged with the judgment debt, and any such order entitles the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor, except that no proceeding can be taken to have the benefit of such charge until after the expiration of six calendar months from the date of the order. Any such order is, in the first instance, *ex parte* only, and may be varied or discharged on good cause shewn (*q*). After the six months have expired a sale of the stock or shares can only be obtained by instituting separate proceedings asking for a sale, which may be either by action or originating summons (*qq*).

Sale there-
under.

Charging a
partner's
interest to
satisfy a
personal
judgment
against him.

If a judgment debtor is a partner in some concern the proper course for the judgment creditor to take to avail himself of his share or interest therein is not to issue execution, but to apply by summons for an order charging the debtor's interest with the amount of the

(*m*) *Mack v. Ward*, W. N. (1884) 16.

(*n*) 17 & 18 Vict. c. 104, s. 233.

(*o*) 33 & 34 Vict. c. 30. As to what are "wages" and who is a "servant" within the meaning of this Act, see *Gordon v. Jennings*, 9 Q. B. D. 45; 51 L. J. Q. B. 417.

(*p*) *Brereton v. Edwards*, 21 Q. B. D. 226; 37 W. R. 47; *Cooper v. Griffin*, (1892) 1 Q. B. 740; 61 L. J. Q. B. 563; 66 L. T. 660.

(*q*) 1 & 2 Vict. c. 110, ss. 14, 15, and Order XLVI. r. 1.

(*qq*) Annual Practice, (1897) 870, notes to Order LXVI. i. 1.

judgment debt, and in addition to such an order being made the Court or a Judge may appoint a receiver of his share, and direct all proper accounts. Such summons must be served not only on the debtor but also on his partners, who are at liberty to redeem or purchase his share (*r*).

When any person is by any judgment or order directed to pay any money, or to deliver up or transfer any property, real or personal, to another, it is not necessary to make any demand thereof, but the person so directed is bound to obey such judgment or order upon being duly served with the same without demand (*s*). This, however, does not make service of a judgment or order upon the judgment debtor necessary before suing out a writ of *fi. fa.* or *elegit* (*t*). A judgment for the payment of money into court, may be enforced by writ of sequestration, or in cases in which attachment is authorised by law, by attachment (*u*). A judgment for recovery or delivery of possession of land may be enforced by writ of possession (*v*). A judgment for the recovery of any property other than land or money may be enforced (1) by writ for delivery of the property, (2) by writ of attachment, (3) by writ of sequestration (*w*). A judgment requiring any person to do any act, other than the payment of money, or to abstain from doing anything, may be enforced by writ of attachment or by committal (*x*).

Service and enforcement of judgments and orders.

Enforcing judgments other than for land or money.

With regard to any judgment or order requiring a Memorandum to be indorsed on certain judgments.

(*r*) 53 & 54 Vict. c. 59 (Partnership Act, 1890), s. 23; Order XLVI. rr. 1a, 1b.

(*s*) Order XLII. r. 1.

(*t*) *Land Credit Company of Ireland v. Fermoyle*, 5 Ch. App. 323.

(*u*) Order XLII. r. 4.

(*v*) Ibid. r. 5.

(*w*) Ibid. r. 6.

(*x*) Ibid. r. 7. Where a mandamus is granted by any judgment or order in an action, no writ of mandamus is now issued, but the judgment or order has the same effect as a writ of mandamus formerly had (Order LIII. r. 4). As to the granting of the prerogative writ of mandamus, see Order LIII. rr. 5, 15.

person to do an act thereby ordered, the time after service within which it is to be done must be stated therein, but if the order omits to fix a time it is not thereby rendered ineffectual, but the Court will, on application, fix a time, and until this is done the order cannot be enforced (*y*). Upon the copy judgment or order served, there must be indorsed a memorandum as follows—viz., “If you the within named A. B. neglect to obey this judgment (or order) by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the same judgment (or order)” (*z*). This provision applies, amongst other things, to orders for discovery, so that although service on the solicitor is sufficient (*a*), yet this memorandum must be indorsed on the copy served (*b*).

Writ for
delivery.

A writ for delivery is a writ commanding the delivery up of certain property, and can be enforced by the sheriff distraining upon the lands and goods of the person until the same is delivered (*c*).

Writ of
attachment.

A writ of attachment is a writ directed to the sheriff (*d*) commanding him to attach or imprison a certain person on account of his contempt of court. No writ of attachment can be issued without the leave of the Court or a Judge, to be applied for on notice to the party against whom the attachment is to be issued (*e*).

Writ of
sequestration.

A writ of sequestration is a writ issued for the purpose of levying on a person's property on account of his

(*y*) *Gilbert v. Endean*, 9 Ch. D. 266; 39 L. T. 404.

(*z*) Order xli. r. 5.

(*a*) Ante, p. 109.

(*b*) *Hampden v. Wallis*, 26 Ch. D. 746; 54 L. J. Ch. 83; 32 W. R. 808.

(*c*) Order xlviii.; Arch. Pr. 14th ed. 904.

(*d*) An attachment against a sheriff is directed to the coroner, and an attachment against a coroner is directed to elisors.

(*e*) Order xlii.; Arch. Pr. 14th ed. 941-954. See also as to Attachment, post, pp. 245, 246.

disobedience to the judgment or order of the Court (*f*). It may be issued to enforce a judgment for the recovery of property other than land or money, and also to enforce an order for payment of money into court, and to enforce a judgment against a corporation. Its effect is the same as that of the old writ of sequestration in Chancery—viz., the sequestrators may enter upon the real estate of the party and take the rents and profits, and also his personal property, and keep the same under the sequestration, until the act has been performed and the contempt cleared. If the party against whom the sequestration is issued dies, the sequestration is not thereby discharged, but it can be proceeded with on reviving the action against the personal representative (*g*). No sequestration to enforce payment of costs only, can be issued without leave of the Court or a Judge (*h*), but in other cases leave is not necessary (*i*). Effect of sequestration.

A writ of possession is a writ issued to the sheriff directing him to put the party in possession of certain lands (*j*). Upon any judgment or order for the recovery of any land and costs, there may be either one writ or separate writs of execution, for the recovery of possession, and for the costs, at the election of the successful party (*k*). Writ of possession.

Where a defendant against whom a judgment has been recovered is a clergyman, there are two writs of execution that may be issued with regard to his benefice, viz., a writ of *feri facias de bonis ecclesiasticis*, and a writ of *sequestrari facias*. These writs are very similar in their nature, being both directed to the bishop of the diocese, and having for their object the raising of Writs of *fi. fa. de bonis ecclesiasticis*, and *sequestrari facias*.

(*f*) See Order LXII. rr. 4, 31, and Order XLIII. r. 6; Arch. Pr. 14th ed. 907.

(*g*) *Pratt v. Inman*, 43 Ch. D. 175; 59 L. J. Ch. 274; 61 L. T. 560.

(*h*) Order XLIII. r. 7.

(*i*) *Sprunt v. Pugh*, 7 Ch. D. 767; 26 W. R. 473.

(*j*) See Order XLVII. rr. 1, 2.

(*k*) Order XLVII. r. 3.

the amount of the judgment debt out of the property of the benefice(*l*). The sequestration has to be published by a copy being affixed to the doors of all churches and chapels within the parish previously to the commencement of divine service on a Sunday, and the writ only has priority from this publication. Both writs are in aid either of a *fi. fa.* or *elegit*, and cannot be issued until after the return to one of such writs, that the party has no goods or no lay fee within the sheriff's bailiwick (*m*).

Execution
against a part-
nership firm.

The student will remember that actions may be brought against a partnership firm in its partnership name without enumerating the particular persons constituting the partnership (*n*). As a doubt might naturally arise in some cases as to whether a certain person is or is not a member of the firm in question, and accordingly whether or not execution may be issued against him, it is specially provided that execution may be issued (1) against any of the direct partnership property, or (2) against any person who has appeared in his own name or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner, or (3) against any person who has been individually served as a partner with the writ and has failed to appear; and, in addition to this, (4) that if the judgment creditor claims to be entitled to issue execution against any other person as being a member of the firm, he may apply to the Court or a Judge for leave to do so, and the Court or a Judge may give such leave if the liability is not disputed, or if disputed may order that the liability of such person be tried and determined in any manner in which any issue or question in an action may be tried and determined. A judgment against a firm does not render liable, release, or otherwise affect any member who was out

(*l*) Arch. Pr. 14th ed. 1176, 1177.

(*m*) Order XLIII. rr. 3, 4, 5.

(*n*) Ante, pp. 49, 50.

of the jurisdiction when the writ was issued, and who has not appeared, unless he has by leave been made a party, or has been served within the jurisdiction after the writ in the action was issued (o).

Any order of the Court or a Judge may be enforced against all parties bound thereby, in the same manner as a judgment to the same effect (p). Enforcing order.

One special kind of judgment should be here mentioned, though not very often occurring. If an action is brought against an executor or administrator and he in his defence states that he has fully administered all assets that have come to his hands—that is, properly exhausted all assets—or all except some small amount (known as pleas of *plene administravit*, and *plene administravit præter* respectively), if the plaintiff cannot disprove this defence he may sign a judgment against any assets which may at any time afterwards come to the defendant's hands. This is called a judgment *quando acciderint* (q). Under the old practice prior to the Judicature Acts, on such a judgment, when assets afterwards came to the hands of the executor or administrator, the plaintiff must, to have taken advantage of them, have first sued out a writ of *scire facias* (r) against such executor or administrator before he could have execution (s). This, however, is not now the proper course, it being provided that where a judgment is to the effect that any party is entitled to any relief subject to or upon the fulfilment of any condition or contingency, the party so entitled may, upon the Judgment *quando acciderint*.
How execution obtained under such a judgment.
Generally as to enforcing any judgment on a contingency.

(o) Order XLVIII. r. 8. As to the suing, service, and appearance of partners, see ante, pp. 49, 50, 57, 58.

(p) Order XLII. r. 24.

(q) See Brown's Law Dict. 2nd ed. p. 435, tit. "Quando acciderint."

(r) A *scire facias* is a judicial writ founded upon some record, and requiring the person against whom it is brought to show cause why the person bringing it should not have advantage of such record, or (as in the case of a *scire facias* to repeal letters patent) why the record should not be annulled and vacated (Arch. Pr. 14th ed. 1285),

(s) Arch. Pr. 14th ed. 1127, 1285, 1286.

fulfilment of the condition or contingency, and demand made upon the party against whom he is entitled to relief, apply to the Court or a Judge for leave to issue execution against such party; and the Court or Judge may, if satisfied that the right to relief has arisen according to the terms of the judgment, order that execution issue accordingly, or may direct that any issue or question necessary for the determination of the rights of the parties be tried in any of the ways in which questions arising in an action may be tried (*t*). The proper course, therefore, for a creditor to take who has obtained such a judgment, and who has ascertained that assets have come to the executor's or administrator's hands, is to serve a demand for payment, and then apply by summons for leave to issue execution, supporting his application by affidavit showing that assets have come to the executor's hands, and that such demand has been made.

Removal of judgment of inferior Court for purpose of execution.

Where judgment has been recovered in an inferior Court of Record, other than a County Court, and there is no property of the defendant within its jurisdiction, the judgment can by order of a Judge be removed into the High Court irrespective of the amount of the judgment, and execution issued thereon in the ordinary way (*u*). With regard to County Courts, it is now provided that if a Judge of the High Court shall be satisfied that a party against whom judgment for an amount exceeding £20, exclusive of costs, has been obtained in a County Court, has no goods or chattels which can be conveniently taken to satisfy such judgment, he may, if he shall think fit, and on such terms as to costs as he may direct, order a writ of *certiorari* to issue to remove the judgment of the County Court into the High Court, and when removed it shall have the same force and effect, and the same proceedings may be had thereon as in the case of a judgment of

(*t*) Order XLII. r. 9.

(*u*) Arch. Pr. 14th ed. 1569.

the High Court, but no action shall be brought upon such judgment (*v*).

The judgment being enforced, the whole object of the action is accomplished and it is at an end. This chapter would, however, be incomplete without some consideration of the subject of the costs that a plaintiff or a defendant is entitled to and is able to include in his judgment, and to enforce against the other party (*w*): a subject which was at Common Law, prior to the Judicature Acts, one of great intricacy and difficulty, and, though it cannot even now be said to be perfectly plain and clear, yet it is much simpler than formerly. There appears to be no good object to be accomplished in a work like the present by going into the former position, for such a course would, in the author's opinion, tend only to confuse the student.

By the Judicature Act 1890 (*x*) it is provided that, subject to Rules of Court and any express statutory provisions, all costs are to be in the discretion of the Court; and by the Rules of Court (*y*) it is also provided that costs are in the discretion of the Court or Judge (*z*), but this is not to deprive a trustee, mortgagee, or other person of any right to costs out of a particular estate or fund to which he would be entitled according to the former rules of Equity, provided that he has not unreasonably instituted, or carried on, or resisted any proceedings, and provided also that where any action or issue is tried by a jury, the costs follow the event, unless upon application made

Costs
generally.

Provisions of
Judicature Act
1890, and
Order LXV.

(*v*) 51 & 52 Vict. c. 43, s. 151.

(*w*) See also as to costs, post, pp. 249-253.

(*x*) 53 & 54 Vict. c. 44, sect. 5.

(*y*) Order LXV. r. 1.

(*z*) It has been decided that in an action in the Chancery Division, this enables a judge to award solicitor and client costs to a successful litigant (*Andrews v. Barnes*, 39 Ch. D. 133; 57 L. J. Ch. 694; 36 W. R. 705); and there seems to be no reason why this decision should not be taken as applying equally to an action in the Queen's Bench Division.

Good cause.

at the trial, for good cause shown, the Judge before whom such action or issue is tried, or the Court, shall otherwise order. With regard to this provision as to "good cause," the Judge who tries the case has two duties thrown upon him; first, he has to decide if there is good cause shown or not, and secondly, if he thinks there is good cause, he has to make such order as to costs as he in his discretion thinks fit. Notwithstanding that the Judicature Act, 1873, provides there shall be no appeal as to costs only (a), an appeal lies on the question of whether there is good cause or not (b), but if the Court of Appeal is satisfied that there is good cause, then the Judge's discretion as to costs will not be interfered with (c). Oppression or misconduct on the part of the successful party would be "good cause," but not the recovery by the plaintiff of part only of what he claims (d); and where a defendant has, by his misstatements, made under circumstances imposing an obligation on him to be truthful, brought litigation on himself, and rendered an action against him reasonable, there is "good cause" for depriving him of his costs (e).

County Courts
Act, 1888.

But notwithstanding what has been stated, it is provided by the County Courts Act, 1888, with regard to actions in the High Court, (1) that if in an action founded on contract the plaintiff shall recover less than £20, he shall not be entitled to any costs, and if he shall recover £20 but not exceeding (g) £50, he shall not be entitled to any more costs than he would have been entitled to if the action had been brought in a

(a) See post, p. 286.

(b) *Jones v. Curling*, 13 Q. B. D. 262; 53 L. J. Q. B. 373; 50 L. T. 349; *Huxley v. West London Extension Railway Co.*, 14 App. Cas. 26; 58 L. J. Q. B. 305; 60 L. T. 542; *Rooke v. Czarnikow*, 4 Times Law Reports, 669; 32 S. J. 607.

(c) *Moore v. Gill*, 4 Times Reports, 738; *Rooke v. Czarnikow*, *supra*.

(d) *Jones v. Curling*, *supra*; *Wood v. Cox*, 5 Times Reports, 272.

(e) Per Fry, L. J., in *Sutcliffe v. Smith*, 2 Times Reports, 881.

(g) *Millington v. Harwood*, (1892) Q. B. 166, 61 L. J. Q. B. 582; 66 L. T. 576.

County Court; (2) that if in an action founded on tort the plaintiff shall recover less than £10, he shall not be entitled to any costs, and if he shall recover £10 but less than £20 he shall not be entitled to any more costs than he would have been entitled to if the action had been brought in a County Court; unless in any such action, whether founded on contract or tort, a Judge of the High Court certifies that there was sufficient reason for bringing the action in that Court, or unless the High Court, or a Judge thereof at Chambers, shall by order allow costs (*h*). The Court or a Judge need not necessarily in making an order for costs where but for the order the plaintiff would get no costs, give costs on the High Court scale, but has jurisdiction, if it thinks fit, to give only County Court costs (*i*).

The result of these provisions as to costs is, that if the plaintiff in an action tried by a jury in the High Court, recovers less than £20 on contract, or £10 on tort, he does not get any costs without a certificate or order, and if it is a case of contract and he recovers £20 but not exceeding £50, or tort and he recovers £10 but less than £20, then he gets his costs, but only according to the County Court scale, unless it is specially ordered that he shall have High Court costs. If, however, the action is one which could not have been brought in the County Court (*ii*), then it has been held that the plaintiff, even

General
explanation.

(*h*) 51 & 52 Vict. c. 43, s. 116. Only a Judge of the High Court can certify, so that an under-sheriff presiding on the hearing of a writ of inquiry after interlocutory judgment has no such power (*Cox v. Hill*, 67 L. T. 28). As to costs on judgments in default of appearance, see ante, p. 61, note (a), and as to costs on summonses under Order xiv. ante, p. 67, note (c).

(*i*) *Neaves v. Spooner*, 58 L. T. 164; 36 W. R. 257.

(*ii*) The County Courts have a general jurisdiction as to personal actions up to £50, also in ejectment actions where neither the value of the property, nor the rent, exceeds £50 a year, subject to the defendant's right within one month of service of the summons, to apply to a judge of the High Court for a trial there, on the ground that the title to lands or hereditaments of greater value than £50, would be affected by the decision. The County Courts have no jurisdiction as regards actions for libel, slander, seduction, or breach of promise of marriage (51 & 52 Vict. c. 43, ss. 56-61).

though he recovers but a farthing, will get High Court costs unless otherwise ordered (*j*), *e.g.*, where the defendant is abroad out of the jurisdiction of the Court (*k*), or where the action is for libel, slander, seduction, or breach of promise of marriage, in all of which cases the County Court has no jurisdiction, and therefore the action is necessarily brought in the High Court (*l*).

Costs on
set-offs and
counter claims.

Where in cases coming within the County Courts Act, 1888, by reason of a set-off the plaintiff recovers only a balance which is less than the sums respectively mentioned in the Act, the provisions of the Act apply. If, however, the defendant's claim is a counter-claim as distinguished from a set-off, then it is different; the plaintiff will get his full costs, if irrespective of the counter-claim the amount he recovers would be sufficient to so entitle him, and the defendant will get any costs in respect of the counter-claim (*m*).

Result as to
costs where
some issues
found in favour
of plaintiff, and
some in favour
of defendant.

Where issues of fact and law are raised upon a claim and counter-claim, the costs of the several issues respectively both of law and fact follow the event unless otherwise ordered (*n*); but in such cases the plaintiff, if he succeeds on his claim, gets the general costs of the cause, although on the finding of the counter-claim the balance may be in favour of the defendant (*o*). Where the defendant actually recovers

(*j*) *Garnett v. Bradley*, L. R. 3 H. L. 944; 48 L. J. Q. B. 186.

(*k*) *Mendelssohn v. Hoppe*, W. N. (1884) 31; 19 L. J. (N.) 108.

(*l*) *Garnett v. Bradley*, *supra*; *Saywood v. Cross*, 14 Q. B. D. 53; 54 L. J. Q. B. 17; 33 W. R. 133.

(*m*) *Stooke v. Taylor*, 5 Q. B. D. 569; 29 W. R. 49; *Bains v. Bromley*, 6 Q. B. D. 691; 50 L. J. Q. B. 465; 29 W. R. 245; *Re Brown, Ward v. Morse*, 23 Ch. D. 377; 52 L. J. Ch. 524; 31 W. R. 936. These are decisions under the County Courts Act, 1867, but are equally applicable to support what is stated in the text.

(*n*) Order LXV. r. 2.

(*o*) *Bains v. Bromley*, 6 Q. B. D. 691; 50 L. J. Q. B. 465; 29 W. R. 245; *Re Brown, Ward v. Morse*, 23 Ch. D. 377; 52 L. J. Ch. 524; 31 W. R. 936; *Lund v. Campbell*, 14 Q. B. D. 821; 54 L. J. Q. B. 201.

something on his counter-claim against the plaintiff, though the amount is less than the sums respectively mentioned in the County Courts Act, 1888, and though the plaintiff has recovered more on his claim, the provisions of that Act do not apply, and the defendant gets his High Court costs in respect of the counter-claim (*p*). Where, though the action is for less than £50, but a counter-claim is made for more than £50 on which the plaintiff succeeds, he is entitled to costs on the counter-claim on the High Court scale (*q*). Where in an action there is a counter-claim, and both claim and counter-claim are dismissed with costs, the defendant has only to pay the sum by which the costs have been increased by the counter-claim (*r*); and in all cases of Taxation. one party getting the costs of the original claim, and the other the costs of the counter-claim, the costs are taxed separately in respect of the original action and of the counter-claim, and the Master's allocatur is given for the difference between the two sets of costs (*s*).

Where the verdict of the jury is in the plaintiff's favour, and if not otherwise ordered, he would get his costs, the Judge at the trial, or the Court, will, if necessary, generally make an order under the latter part of Order LXV. Rule 1 (*t*), depriving the plaintiff of his costs where the action is a frivolous one, or one that should not have been brought; and in exercising this discretion the Judge is not confined to the consideration of the conduct of the party in the course of the litigation, but may consider his conduct previous

Depriving
successful
party of costs.

(*p*) *Blake v. Appleyard*, 3 Ex. D. 195; 47 L. J. Ex. 407. This is a decision under the County Courts Acts, 1867, but is equally applicable to support what is stated in the text.

(*q*) *Amon v. Bobbett*, 22 Q. B. D. 543; 58 L. J. Q. B. 219; 60 L. T. 912.

(*r*) *Saner v. Bilton*, 11 Ch. D. 416; *Mason v. Brentini*, 15 Ch. D. 287; 29 W. R. 126.

(*s*) *McGowan v. Middleton*, 11 Q. B. D. 464; 31 W. R. 835.

(*t*) Ante, pp. 171, 172. The application to the Judge, or the Court, is an alternative and not an appellate jurisdiction (*Marsden v. Lanc. and York Ry. Co.*, 7 Q. B. D. 641; 50 L. J. Q. B. 318).

Ordering
successful
party to pay
costs.

to and conducting to the action (*u*). And a plaintiff successful at the trial may not only be deprived of his costs, but he may be ordered to pay the defendant's costs (*v*). So if a defendant obtains a verdict, an order may in some cases be made depriving him of his costs (*w*); but it is not within the discretion of the Court to make a defendant pay the whole costs of the action if the plaintiff had no right to sue (*x*). Any order as to costs only, is not subject to any appeal except by leave of the Court or Judge making such order (*y*), but this does not apply where the Court has exceeded its powers, as in ordering a defendant to pay costs where the plaintiff had no right to sue (*z*).

Taxation.

The costs given against an opponent are taxed by one of the Masters. A copy of the bill of costs is delivered to the opponent's solicitor, together with at least one day's notice of an appointment to tax same, and if required, an affidavit of increase must be made (*a*). This affidavit of increase is an affidavit made by the solicitor, or his managing clerk (who must depose that he has had the management of the action), verifying the payments to counsel and witnesses, length of brief, &c. Notice of taxing costs is not necessary where the defendant has not appeared (*b*). The costs having been taxed, the amount thereof is filled in the judgment by the Master (*c*).

Affidavit of
increase.

Higher and
Lower scales
of costs.

As regards High Court costs there are two scales of

(*u*) *Harnett v. Vyse*, 5 Ex. D. 307; 43 L. T. 645; 29 W. R. 7.

(*v*) *Harris v. Petherick*, 4 Q. B. D. 611; 48 L. J. Q. B. 521.

(*w*) Order LXV. r. 1.

(*x*) *Dicks v. Yates*, 18 Ch. D. 76; 50 L. J. Ch. 809; *Foster v. Great Western Railway Company*, 8 Q. B. D. 575; 51 L. J. Q. B. 244; 30 W. R. 398.

(*y*) Jud. Act, 1873, s. 49, and see ante, p. 172.

(*z*) *Dicks v. Yates*, 18 Ch. D. 76; 50 L. J. Ch. 809; *Foster v. Great Western Railway Company*, 8 Q. B. D. 575; 51 L. J. Q. B. 244; 30 W. R. 398.

(*a*) Order LXV. r. 16.

(*b*) Ibid. r. 17.

(*c*) See generally as to allowances on taxation, Order LXV. r. 27.

costs allowed—the “Higher” and the “Lower”—and the latter is now always the scale to be observed in taxing costs in all actions unless otherwise ordered (*d*), but full power is given to the Court or a Judge to order taxation on the higher scale, either of the whole costs of the cause or of any particular application, where by reason of special grounds arising out of the nature and importance, or difficulty, or urgency of the case it appears right to do so (*e*); but it has been held that the amount at stake in an action is not of itself a sufficient reason for allowance on the higher scale, and that for this there must always be special circumstances of urgency or difficulty shewn (*f*). Thus, in a successful action for breach of covenant in restraint of trade, the plaintiffs were allowed costs subsequent to reply on the higher scale, on the ground of the importance of the case, and the way in which it had been got up and conducted (*g*); and so also the plaintiffs were allowed costs on the higher scale in a partition suit where the proceedings had been ably conducted and unnecessary expenses saved (*gg*). Where a solicitor’s bill is being taxed not under an order for taxation and payment against an opposite party, or out of a fund or estate, but for the purpose of ascertaining the amount due to him from his client, the Taxing Master, though he is primarily to tax on the lower scale, has a discretion to make any allowances on the higher scale (*h*).

Solicitor and
client taxation.

The costs that are obtained against an opponent in an action are called party and party costs, and those that a solicitor charges against his own client are called solicitor and client costs. The difference is that

Difference
between party
and party, and
solicitor and
client costs.

(*d*) Order LXV. r. 8.

(*e*) Ibid. r. 9.

(*f*) *The Horace*, 9 P. D. 86; 53 L. J. (P.) 64; 32 W. R. 755. *Hudson v. Osgerby*, 50 L. T. 323, 32 W. R. 566; *Re Spettigue’s Trusts*, 32 W. R. 385.

(*g*) *Davies v. Davies*, 56 L. J. Ch. 481; 35 W. R. 697.

(*gg*) *Marriott v. Cobbett*, 38 Solrs. Journal, 610; *Law Students’ Journal*, Aug. 1894, 172.

(*h*) Order LXV. r. 10.

Costs of
shorthand
notes, &c.

Shorthand
notes of
judgment.

Extraordinary
expenses
incurred by
solicitor.

Delivery of
solicitor's bill,
and taxation
by client.

party and party costs comprise only things actually necessary in the action, but solicitor and client costs include, in addition, many things advisable under the circumstances—*e.g.*, opinions of counsel, &c. From this it follows that items may be disallowed in a solicitor's bill taxed as between party and party, which he may be entitled to charge against his client as being proper solicitor and client costs. The costs of taking shorthand notes are not allowed on a party and party taxation without the special direction of the Court obtained when judgment is delivered or before it is drawn up, and the agreement of the solicitors makes no difference; and a Judge at Chambers, or Master, has no power to order shorthand notes of evidence given before him to be taken, though the costs of evidence so taken by the consent of all parties may be allowed (*i*). If, however, a shorthand note is taken of a judgment, and the case goes to appeal, the costs of the appeal are deemed to include such shorthand notes in the absence of any direction to the contrary (*j*). And as regards a solicitor's bill against his client, if any extraordinary or unusual expenses are intended to be incurred by him, such, for instance, as the taking of shorthand notes, it is the solicitor's duty to point out to his client that the additional expenses so incurred will not be allowed to him, even if successful in the action, on taxation between party and party, and in default of so doing, the solicitor will not be entitled to charge his client with the costs so incurred (*k*).

A solicitor before he can sue a client for his bill of costs, must have delivered it signed, or with a letter signed, a month previously (*l*), unless he can show that

(*i*) *Re Hilleary & Taylor*, 35 W. R. 705; 56 L. T. 867.

(*j*) *Humphrey v. Sumner*, 55 L. T. 649.

(*k*) *Re Blyth and Fanshawe*, 10 Q. B. D. 207; 52 L. J. Q. B. 186; 31 W. R. 283.

(*l*) 6 & 7 Vict. c. 73, s. 37. Where a solicitor assigned his costs before delivery of a bill, it was held that signature of the bill by the

there is probable cause to believe that his client is about to quit England, or to become a bankrupt, or a liquidating or compounding debtor, or to take any other steps or do any other act which in the opinion of the Judge would tend to defeat or delay such solicitor in obtaining payment, when leave may be given him to sue notwithstanding the month has not expired (*m*). Every client has a right to have his solicitor's bill of costs taxed. Within a month of the delivery of the bill he may obtain an order for taxation as of course; after a month, he may still obtain this order on application *ex parte* by summons; but after the expiration of twelve months, or after payment, he can only obtain an order to tax on showing special circumstances—*e.g.*, gross overcharge. If on taxation less than one-sixth is taxed off, the client has to pay the costs of the taxation; but if one-sixth is taxed off, then the solicitor has to pay such costs (*n*). It may be noticed that on a common order to tax obtained by the client, he can object to specific items on the ground of want of retainer, unless he has admitted the retainer by his petition, and the Taxing Master has jurisdiction to decide the objection as to those specific items, though, if the objection is to the whole bill, the solicitor has a right to a jury (*o*). When a solicitor sues on a bill of costs which is liable to be taxed, and succeeds, the proper form of judgment is for such amount as may be shewn to be due by the Taxing Master's allocatur on a taxation which is then directed.

Right to taxation.

Objection to no retainer.

If in any case it appears to the Court or a Judge that costs have been incurred improperly or without any reasonable cause, or that by reason of any undue

Disallowance to a solicitor of costs in certain cases, &c.

assignee who delivered it was sufficient (*Ingle v. M'Cutchan*, 12 Q. B. D. 518; 53 L. J. Q. B. 311).

(*m*) 38 & 39 Vict. c. 79.

(*n*) 6 & 7 Vict. c. 73, s. 37. See further as to solicitors' costs, 33 & 34 Vict. c. 28, and 44 & 45 Vict. c. 44, and general order thereunder of 1882. See also hereon Arch. Pr. 14th ed. 671, *et seq.*

(*o*) Re *Herbert*, 34 Ch. D. 504; Re *Jones*, 36 Ch. D. 105.

Solicitor
acting for
himself.

delay in proceeding under any judgment or order, or of any misconduct or default of the solicitor, any costs properly incurred have nevertheless proved fruitless to the person incurring the same, the Court or Judge may call on the solicitor of the person by whom such costs have been so incurred, to shew cause why such costs should not be disallowed as between the solicitor and his client, and also (if the circumstances of the case shall require), why the solicitor should not repay to his client any costs which the client may have been ordered to pay to any other person, and thereupon may make such order as the justice of the case may require (*q*). A solicitor appearing for himself is entitled to the same costs as if he had employed a solicitor, except as to such charges as are rendered unnecessary by reason of his acting in person—*e.g.*, instruction or attendances on himself (*r*), and the same principle applies where a solicitor acts by the firm of which he is a partner (*s*). A solicitor who is a mortgagee, and acts for himself in connection with the preparation of, or in any way enforcing or defending his rights under the mortgage—*e.g.*, in a foreclosure or redemption suit—is now allowed to charge his profit costs (*t*).

Reviewing
taxation.

If any party is dissatisfied with the taxation of the costs in either the Chancery or the Queen's Bench Division, he is entitled to bring the point before the Court or a Judge. The course to obtain this review of the taxation is to deliver to the other party interested therein, and carry in before the Taxing Master, objections in writing to the taxation, before the certificate or allocatur is signed, specifying therein by a list in a short and concise form, the items or parts

Objections.

(*q*) Order XLV. r. 11. See further, as to Taxation of Costs, post, pp. 250-253.

(*r*) *London Scottish Benefit Society v. Chorley*, 13 Q. B. D. 872 ; 53 L. J. Q. B. 551 ; 32 W. R. 781 ; 51 L. T. 100.

(*s*) *Bilder v. Bridges*, W. N. (1887) 208.

(*t*) 58 & 59 Vict. c. 25 (Mortgagees' Legal Costs Act, 1895) sects. 2, 3.

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or (3) if the question in dispute consists wholly or in part of matters of account, the Court or a Judge may at any time order the whole cause or matter, or any question or issue of fact therein, to be tried before a special referee, or arbitrator, agreed on by the parties, or before an official referee or officer of the Court (*dd*).

There are here, therefore, two distinct provisions, and we see that a matter may be referred merely for inquiry and report, or for the referee or arbitrator to adjudicate upon. The order should show on its face in which way it is referred (*e*), and if for inquiry and report the report is addressed to the Court or Judge by whom the matter was referred, and the Court may adopt or partially adopt, or reject it, as it thinks right (*f*). When the report is made, the referee on the same day causes notice to be given to all the parties by prepaid post letter, and they, in due course of post, are to be deemed to have notice of such report (*g*). If the Court adopts the referee's report it may be enforced as a judgment or order to that effect (*h*). With regard to a reference for trial the grounds should be carefully observed, and the main ground is that the action embraces matters of account. If this is so, though the action embraces other matters, yet the whole may be referred; but where there is a preliminary question as to liability to be decided before the question of account can arise, then there is no power to refer (*i*). Subject to the order of the Court or Judge directing the reference, a referee or arbitrator has the same powers to order judgment to be entered for any or either party as a Judge (*j*). An order for

Two modes of referring matters.

Reference for inquiry and report.

Reference for trial.

Costs.

(*dd*) 52 & 53 Vict. c. 49, sect. 14.

(*e*) *White v. Peto*, W. N. (1886) 165.

(*f*) *Wenlock v. River Dee Co.*, 19 Q. B. D. 155.

(*g*) Order xxxvi. rr. 53, 55c.

(*h*) 52 & 53 Vict. c. 49, s. 13 (2).

(*i*) Annual Practice, (1897) 181.

(*j*) Order xxxvi. rr. 50, 52a, 55c.

reference may be made on such terms as to costs as the authority making it thinks just; and in the absence of any provision hereon in the order of reference, the referee or arbitrator has full power to deal with the costs (*k*).

Appeal against
award or
certificate.

Where there has been a compulsory reference, any party may appeal from the award or certificate upon any question of law, and on the application of any party the Court may set aside the award on any ground on which it might set aside the verdict of a jury, or it may remit all or any part of the matter in dispute to the arbitrator or referee, or make any order with respect to the award or certificate, or any of the matters in dispute that may be just (*l*). The appeal is to a Divisional Court, which has power not only to set aside such judgment but to enter any other in lieu thereof (*m*). Where there has been a compulsory reference to *arbitration* the decision of the Divisional Court on appeal is final, and there is no appeal to the Court of Appeal except by leave; but where an action is referred *for trial* compulsorily, an appeal lies from the Divisional Court to the Court of Appeal without leave (*n*). In case an application is made for a new trial of a case tried before a referee, the application must be made to a Divisional Court and not to the Court of Appeal (*o*).

Arbitration
under
submission,

But apart from arbitration or reference by the order of the Court or a Judge, parties may agree to submit their differences to arbitration, and a submission (*p*), unless a contrary intention is expressed therein, is irrevocable except by leave of the Court or a Judge (*q*).

(*k*) Order XXXVI. rr. 55b, 55c.

(*l*) Order XLIX. r. 3.

(*m*) *Clark v. Sonnenschein*, 25 Q. B. D. 246.

(*n*) Annual Practice, (1897) 185.

(*o*) *Gower v. Tobitt*, 39 W. R. 193.

(*p*) A submission is defined in the Act as a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not (s. 27).

(*q*) 52 & 53 Vict. c. 49, s. 1.

And it is provided that if any party to a submission commences any legal proceedings in respect of any of the matters agreed to be referred, any party thereto may at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to the Court to stay the same, and the Court or Judge, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings (r). Staying proceedings after submission.

If on a submission to arbitration no other mode of reference is provided, it is to a single arbitrator; but the parties can agree that there shall be two arbitrators, and if so, the two arbitrators may appoint an umpire within the period during which they have power to make an award. Arbitrators must make their award in writing within three months of entering on the reference, or after having been called upon by notice in writing from any party to the submission, or on or before any later day to which the arbitrators, by any writing signed by them, may from time to time enlarge the time for making the award. If the arbitrators do not within the proper time make their award, or if they deliver to any party to the submission or to the umpire a notice in writing stating that they cannot agree, the umpire may forthwith enter on the reference in lieu of the arbitrators. The umpire must then make his award within one month after the original or extended time for the making of the award of the arbitrators has expired, or on or before any later day to which the umpire, by any writing Submission to one arbitrator or more than one.
Time for award.

(r) 52 & 53 Vict. c. 49, s. 4. *Ives v. Willans* (1894) 2 Ch. 478; 63 L. J. Ch. 521; 70 L. T. 674.

signed by him, may from time to time enlarge the time for making his award. In addition, the Court or a Judge has power to enlarge the time for making an award, whether the time for making it has expired or not. The arbitrators and umpire have full power to examine witnesses on oath or affirmation, and to administer oaths and take affirmations, and the parties must duly submit to be examined, and produce all books and documents (*s*). The attendance of witnesses may be compelled by means of subpcena, as at the trial of an action (*t*).

Witnesses.

Power of Court to appoint an umpire.

If a submission is to a single arbitrator, and the parties do not concur in his appointment, or if the arbitrator dies or is incapable to act, or if arbitrators do not, when they should do so, appoint an umpire, or such umpire refuses or is incapable to act or dies, and the submission does not show that the vacancy was not intended to be supplied, and the parties or the arbitrators do not supply the vacancy, any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator or umpire, and then, if the appointment is not made within seven clear days, the Court or a Judge may, on application by the party who gave the notice, appoint an arbitrator or umpire (*u*).

Power for parties in certain cases to supply vacancy.

Where a submission is to two arbitrators, one to be appointed by each party, then, unless the submission expresses a contrary intention, if either arbitrator refuses to act, or is incapable of acting or dies, the party who appointed him may appoint a new arbitrator in his place. If a party who should appoint an arbitrator neglects to do so for seven clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make

(*s*) 52 & 53 Vict. c. 49, Schedule I. and ss. 7, 9.

(*t*) Ibid. ss. 8, 18.

(*u*) Ibid. s. 5.

the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as the sole arbitrator in the reference, and his award is binding on both parties as if he had been appointed by consent (*v*).

An arbitrator in his award may state the whole of the matter, or any part thereof, in the form of a special case for the opinion of the Court, or he may at any stage state a special case for the opinion of the Court on any question of law. Although the arbitrator has made his award, he may correct any clerical mistake or error arising from any accidental slip or omission (*w*). Arbitrator may state special case.

Where an arbitrator or umpire has misconducted himself, the Court may remove him, and where he has misconducted himself, or the arbitration or award has been improperly procured, the Court may set the award aside (*x*). An application (which is by motion stating the grounds) to set aside an award, must be made before the last day of the sittings next after such award has been made and published to the parties (*xx*). An award is final, subject to this, that the Court may remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire (*y*). Setting aside award.

An award on a submission may be enforced in the same way as a judgment or order to the same effect (*z*), and notwithstanding that the time for moving to set it aside has not expired (*zz*); but an application for leave to enforce the award must first be made by means of an originating summons before a Master in Enforcing award.

(*v*) 52 & 53 Vict. c. 49, s. 6.

(*w*) Ibid. ss. 7, 19.

(*xx*) Order LXIV. r. 14.

(*y*) 52 & 53 Vict. c. 49, s. 10.

(*zz*) Order XLII. r. 31a.

(*x*) Ibid. s. 11.

(*z*) Ibid. s. 12.

Chambers. The applicant must produce the original award and a duplicate thereof, together with an affidavit verifying both the original and duplicate. An order is then made, unless some good cause is shewn against it—*e.g.*, that the award is uncertain, and execution may then be duly issued (*a*). If an award cannot be thus summarily enforced an action may in some cases be brought upon it.

(*a*) Annual Practice, (1897) 175, 176.

PART III.

OF THE PRACTICE AS SPECIALLY OCCURRING IN THE CHANCERY DIVISION.

INTRODUCTORY.

BEFORE commencing this Part of the work, the student must be reminded of what has already been noticed (*a*)—viz., that the great principle running through the Judicature Acts is the unison as far as possible of Law and Equity. It was impossible to assimilate the practice altogether, because of the different kinds of cases coming under the cognisance of Common Law, on the one hand, and Chancery on the other; and had there been no such difference, there would have been no necessity for the marking out of the Court into Divisions. However, as far as possible—that is to say, in all those proceedings which are necessary to be taken equally in all the Divisions—the steps are the same; and therefore in the present Part of this work, wherever this is so, and the matter has already been dealt with in Part II., it is not again referred to, or at most passing reference only is made, without going again into explanation, as that would be useless repetition. On all such points, therefore, if the student has not become thoroughly conversant with them from his perusal of Part II., he must refer back, and, as far as possible, references will be found given throughout to the prior pages in which the subject is dealt with. Generally, it must be remembered that the practice is common to both Divisions.

(*a*) Ante, p. 9.

CHAPTER I.

PROCEEDINGS TO THE FIRST HEARING AND JUDGMENT.

Commencing
proceedings.

PROCEEDINGS are usually commenced by action, the first step in which is the writ of summons (*b*), but there are, in addition, certain special ways in which in some cases proceedings may be commenced—viz., by petition, motion, summons, and special case. These are, however, dealt with subsequently in Chapter V. of this

Assignment to
particular
Judge.

Part (*c*). The writ of summons must be marked with the name of one of the Judges of the Division to whom for the time being Chambers are attached, and it is then treated as assigned to that Judge. The plaintiff has not the right of selecting his Judge, but it is the duty of the officer issuing the writ to mark the same with the name of one of such Judges, to be ascertained by rota. After assignment in this way every subsequent writ, summons, or proceeding relating to the administration of the same trust, or the winding up of the same company, or so connected therewith as to be conveniently dealt with by the same Judge, must when-ever practicable be marked by the proper officer with the name of such Judge. It is provided that the party or solicitor issuing or presenting such writ, summons, or petition, shall, if there be to his knowledge such relation or connection, so certify, and such certificate shall be countersigned by the Master (*cc*) to whom according to the distribution of business such cause or matter belongs (*d*). The Lord Chancellor has full

Certificate in
case of future
proceedings.

(*b*) Ante, p. 43.

(*c*) Post, pp. 254–278.

(*cc*) Formerly Chief Clerk, see ante, p. 21.

(*d*) Order v. r. 9.

power to transfer actions from one Judge to another generally, or for the purposes of hearing or trial only (*e*), or for the disposal of any particular application (*f*); and any other Division may at the request or with the consent of any other Judge of this Division before whom a matter or cause is pending, hear such cause or matter or any application therein without any transfer or consent of the parties (*g*).

Transfer to, or hearing by another Judge.

The course to be pursued in the event of the non-appearance of the defendant to the writ is usually utterly different from that in the Queen's Bench Division, dealt with in Part II. (*h*), though of course there may be cases in which it is not so; that is to say, in which the action is of such a kind that it could properly have been assigned to the Queen's Bench Division, had the plaintiff so chosen. It follows naturally that the practice should here be different, for the plaintiff is usually suing for something going far beyond a mere judgment by default—*e.g.*, he may be seeking administration of some estate, with special inquiries, the propriety of which the Court must consider.

Effect of non-appearance.

The effect, then, of non-appearance to the writ is this, that upon the plaintiff filing a proper affidavit of service, and also (if the writ is not specially indorsed under Order III. Rule 6 (*i*)), a statement of claim, the action proceeds in the same way as if the defendant had appeared (*j*)—that is to say, the plaintiff will go to a hearing, proceed afterwards in Chambers, and then to conclusion, as hereafter detailed, in just the same manner as if the defendant was before the Court, except that the truth of the allegations in the statement

(*e*) Order XLIX. rr. 1, 2.

(*f*) Ibid. r. 4.

(*g*) Ibid. r. 4a.

(*h*) See ante, pp. 61–64.

(*i*) See ante, pp. 45, 46. I would remind the student that in an action to recover a liquidated amount due on a trust, the writ may be specially indorsed.

(*j*) Order XIII. r. 12.

of claim are taken to be admitted. Any pleading is in the case of non-appearance filed in the Central Office, or in the district registry, as the case may be (*k*).

Order XIV. and proceeding to trial without pleadings.

If the defendant appears and the writ contains any special indorsement under Order III. Rule 6, a summons may be taken out under Order XIV., but this is rarely seen in the Chancery Division (*l*). So also the provisions as to proceeding to trial without pleadings equally apply to the Chancery Division (*m*).

Pleadings.

After appearance the pleadings then take place, and the general rules to be observed, as to their delivery and otherwise, are the same as in an action in the Queen's Bench Division (*n*); and here the only point necessary to specially notice, is the effect of the defendant making default in delivering his statement of defence. In the same way that the effect of non-appearance is different, as just stated, so the effect of this default in pleading is usually entirely different from what it would be in the Queen's Bench Division, and for the same reasons. The result here is that the plaintiff may set down the action on motion for judgment so as to have the cause duly heard (*o*). If there are several defendants, and one only makes default, the plaintiff may either (if the cause of action is severable) set down the action at once on motion for judgment against him, or may set it down against him at the time when it is entered for trial, or set down on motion for judgment, against the other defendants (*p*).

Motion for judgment.

A motion for judgment is not treated as an ordinary motion (*q*), but it is set down in the Cause Book in the

(*k*) Order XIII. r. 12; Order XXXV. r. 1.

(*l*) As to Order XIV., see ante, pp. 66-68.

(*m*) As to this, see ante, pp. 70, 71.

(*n*) See ante, Part II. chap. iii. pp. 70-90. See specimen set of pleadings in an action in the Chancery Division, in Appendix II. hereto, post, pp. 315, 316.

(*o*) Order XXVII. r. 11.

(*p*) Ibid. r. 12.

(*q*) As to which see post, pp. 223, 224.

same way, and the same fee paid, as if notice of trial had been given. The notice should be served two clear days at least before the day named in it as the day when the motion will be made (*r*), and the notice must be given before it can be entered for hearing. This is the ordinary way of obtaining judgment in Chancery actions, except where it is otherwise provided (*s*).

Assuming that the plaintiff does not proceed by motion for judgment and that issue is joined, or the action is one in which notice has been given of intention to proceed to trial without pleadings, notice of trial is then given, the cause is entered for trial and in due course it comes on to be heard (*t*). As to the different modes of trial in the Queen's Bench Division and the rules governing the same, the student is referred to Part II. chapter v. (*u*); but it is specially provided that causes or matters assigned by the Judicature Act, 1873, to the Chancery Division shall be tried by a Judge without a jury unless the Court or a Judge shall otherwise order (*v*), and the ordering a jury is here a matter in the Judge's discretion (*w*). Notice of trial having been given the cause is duly entered for trial at the office of the registrars, whose duty it is to keep distinct lists of the causes and matters set down to be heard before each Judge of that Division (*x*). Where an order is made for trial of a Chancery matter with a jury, the course is now not for the trial to take place before the Chancery Judge, for this has been found inconvenient as tending to block up the Court and prevent the regular routine of business, but such actions are tried in the county or place named in the statement of claim, or if

Notice of trial, &c.

No jury unless specially ordered.

Mode of disposal of jury cases.

(*r*) *Parsons v. Harris*, 6 Ch. D. 694; 25 W. R. 410.

(*s*) Order XL. r. 1.

(*t*) See ante, pp. 132-135.

(*u*) Ante, pp. 133, 134.

(*v*) Order xxxvi. r. 3.

(*w*) *Ruston v. Tobin*, 10 Ch. D. 558; *Gardner v. Jay*, W. N. (1885) 41; 33 W. R. 470; *Sheppard v. Gilmore*, 34 W. R. 179; 53 L. T. 625.

(*x*) Order LXII. r. 17.

no place is named they are placed in the list of actions for trial in the County of Middlesex in exactly the same way as in the Queen's Bench Division (*y*).

Evidence.

The evidence at the hearing in this Division is sometimes taken by affidavit. The general rule as to evidence is that, in the absence of agreement between the parties, it is to be *viva voce* unless otherwise ordered (*z*); but sometimes the parties agree that the evidence shall be by affidavit, according to the old practice in Chancery, as being under the circumstances the more convenient course.

Procedure on agreement to take evidence by affidavit.

The procedure when the parties have consented to the evidence at the hearing being by affidavit is as follows: Within fourteen days after the consent, or within such time as the parties may agree upon or a Judge in Chambers may allow, the plaintiff files his affidavits and delivers to the defendant or his solicitor a list thereof (*a*); the defendant has then fourteen days after delivery of such list, or such time as the parties may agree upon or a Judge in Chambers may allow, within which he files his affidavits in answer, and delivers a like list thereof to the plaintiff or his solicitor (*b*); and the plaintiff then, within seven days after the expiration of the last-mentioned fourteen days, or such other time as aforesaid, files affidavits in reply (if any), and delivers a list thereof to the defendant or his solicitor, and these last-mentioned affidavits must be confined to matters strictly in reply (*c*). When the evidence is taken by affidavit, such evidence must be printed, and the notice of trial is given at such time or times after the close of the evidence

Printing affidavits.

(*y*) *Warner v. Murdock*, 4 Ch. D. 750; 46 L. J. Ch. 121. See as to the various circuits, and the arrangements for taking business thereat, ante, pp. 20, 21.

(*z*) Order xxxvii. r. 1. See ante, p. 140.

(*a*) Order xxxviii. r. 25.

(*b*) Ibid. r. 26.

(*c*) Ibid. r. 27.

as in other cases is provided after the close of the pleadings (*d*).

The witnesses who have thus made affidavits are liable to be cross-examined thereon. The usual course is this: within fourteen days after the expiration of the time limited for filing affidavits in reply, notice may be given by either party to his opponent to produce any deponent at the trial for cross-examination, and if not produced his affidavit cannot be used as evidence without special leave, and the party requiring such production is not obliged in the first instance to pay the expenses of the witness attending at the trial (*e*). The party to whom the notice is given is often able to arrange with his witnesses to attend at the trial, but he is entitled also to compel their attendance in the same way as he might compel the attendance of a witness to be examined, that is to say, by subpoena (*f*) in the ordinary way (*g*). In addition to this, the attendance of a witness for cross-examination on his affidavit may be directly enforced by the party desiring to cross-examine, by means of a subpoena (*h*).

Cross-examination in such cases.

In all causes or matters to which any infant or person of unsound mind, whether so found by inquisition or not, or person under any other disability is a party, any consent as to the mode of taking evidence or as to any other procedure, if given with the sanction of the Court or a Judge by the next friend, guardian, committee, or other person acting on behalf of the person under disability, has the same force and effect as if such party were under no disability and had given such consent; but no such consent by any committee of a lunatic is valid as between him and the lunatic,

Consent as to evidence by affidavit by person under disability.

(*d*) Order xxxviii. r. 30.

(*e*) Ibid. r. 28.

(*f*) Ibid. r. 29. As to subpoenas, see ante, pp. 140, 141.

(*g*) Ibid. r. 3.

(*h*) Order xxxvii. r. 20; *Connell v. Baker*, 29 Ch. D. 711.

unless given with the sanction of the Lord Chancellor or Lords Justices sitting in Lunacy (*i*).

Different parts
of an affidavit.

Affidavits may be said to consist of four parts—viz. (1) the title, consisting of the heading in the Court, the reference number, and the names of the parties (*j*); (2) the name and description of the deponent; (3) the body or contents; and (4) the jurat, that is, a statement of the place where, and the date when, and before whom, sworn. Affidavits are made in the first person, divided into paragraphs, numbered consecutively, and each paragraph relating, as far as may be, to a distinct subject-matter, and they must be written or printed bookwise (*k*). They must state the description and true place of abode of the deponent (*l*), and must be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory applications, when statements as to his belief, with the grounds thereof, may be admitted (*m*). There must be indorsed on every affidavit a note showing on whose behalf it is filed (*n*).

Rules to be
observed in
framing
affidavits.

Distinction be-
tween affida-
vite used at
the hearing,
and on
interlocutory
applications.

Before whom
affidavits may
be sworn.

Affidavits may be sworn in England before a Judge, District Registrar, Commissioner to administer oaths, or officer empowered under the Rules to administer oaths (*o*); and in Scotland, Ireland, the Channel Islands, or any colony or place abroad under British dominion, before any Judge, Court, notary public, or person lawfully authorised to administer oaths in such place; or before any of her Majesty's consuls or vice-

(*i*) Order XVI. r. 21.

(*j*) If there is more than one plaintiff or defendant, it is sufficient to state the full name of the first plaintiff or defendant respectively, and that there are other plaintiffs or defendants as the case may be, and the costs occasioned by any unnecessary prolixity in any such title are to be disallowed by the taxing officer. Order XXXVIII. r. 2.

(*k*) Order XXXVIII. r. 7.

(*l*) Ibid. r. 8.

(*m*) Ibid. r. 3. This includes secondary evidence. (*Spencer v. Bailey*, 93 L. T. Newspaper, 223; Law Student's' Jl. Aug. 1892, p. 178).

(*n*) Order XXXVIII. r. 10.

(*o*) Ibid. r. 4.

consuls in any foreign part out of Her Majesty's dominions (*p*).

The cost of every affidavit which unnecessarily sets forth matters of hearsay or argumentative matter, or copies of or extracts from documents, are to be paid by the party filing the same (*q*). Any scandalous matter may be ordered to be struck out of any affidavit with costs as between solicitor and client (*r*).

Costs of improper matter in affidavits.

Where any affidavit is sworn by any person who appears to the officer taking the affidavit to be illiterate or blind, he must certify in the jurat that it was read in his presence to the deponent, who seemed perfectly to understand it, and made his signature in the presence of such officer (*s*). An affidavit cannot be sworn before the solicitor acting for the party on whose behalf the affidavit is to be used, or his partner, or clerk, or before that solicitor's agent, or his partner, or clerk (*t*).

Illiterate or blind deponent.

Solicitor cannot swear his own client.

Strictly to entitle a person to read an affidavit, it must have been made in the particular cause or matter; but an affidavit made in another cause or matter may, saving all just exceptions, be read on *ex parte* applications by leave of the Court or a Judge to be obtained at the time of making any such application, and in any other case upon the party desiring to use such evidence giving two days' previous notice to the other parties of his intention to read such evidence, and no order is necessary (*u*). For these provisions to apply it is necessary for the action to be between the same parties, or their privies, or the persons they represent, and the issue must be exactly the same (*uu*).

Reading affidavit filed in another action.

Two days notice.

(*p*) Order xxxviii. r. 6. *Cooke v. Wilby*, 25 Ch. D. 769; 53 L. J. Ch. 592; 32 W. R. 379.

(*q*) Order xxxviii. r. 3.

(*r*) Ibid. r. 11.

(*s*) Ibid. r. 13.

(*t*) Ibid. rr. 16, 17.

(*u*) Order xxxvii. r. 3. *Moggridge v. Hall*, 13 Ch. D. 380; 28 W. R. 487.

(*uu*) *Printing, &c., Co. v. Drucker* (1894), 2 Q. B. 801; 64 L. J. Q. B. 58; 71 L. T. 172.

Using evidence
at trial filed
before issue
joined.

With regard to evidence to be used at the trial, it is provided that no affidavit or deposition filed or made before issue joined shall without special leave be received at the hearing, unless within one month after issue joined notice in writing shall have been given by the party intending to use the same to the opposite party of such his intention (*v*). All evidence, however, taken at the hearing or trial may without any special notice or leave be used in any subsequent proceedings in the same cause or matter (*w*)

Evidence used
at trial may
be used after-
wards.

Procedure at
hearing.

To return—notice of trial having been given, the cause set down, and the briefs prepared and delivered, the action in due course comes on to be heard. At the hearing the leading counsel for the plaintiff usually opens and goes into the case, and is followed by his junior, then in like manner the respective senior and junior counsel for the defendant are heard, the plaintiff's leading counsel replies, and the Judge then proceeds to give judgment (*x*). This judgment, in most cases, does not dispose of the action altogether, but directs certain accounts and inquiries to be taken and made, which are proceeded with as hereafter explained (*y*), and the action is afterwards ultimately disposed of in the way also hereafter detailed (*z*).

Drawing up
of judgment.

The judgment pronounced by the Court has to be drawn up, the procedure being as follows: The solicitor having the carriage of the proceedings (usually the plaintiff's solicitor) leaves his counsel's brief and any other necessary papers with the Registrar (*a*), who was that day attending in the particular Court, but the order may be thus bespoken by any party, and if not bespoken within seven days after the judgment

(*v*) Order xxxvii. r. 24.

(*w*) Ibid. r. 25.

(*x*) See also hereon, ante, pp. 144, 145.

(*y*) Post, ch. ii. pp. 203-221. See form of such a judgment in Appendix II. hereto, post, p. 317.

(*z*) Post, ch. iv. p. 242.

(*a*) As to this officer, see ante, p. 24.

or order is pronounced or finally disposed of by the Court or a Judge, the Registrar may decline to draw it up without leave of the Court or a Judge. The Registrar prepares a draft of the proper order, and the plaintiff's solicitor gives one clear day's notice at least to the other parties of an appointment before the Registrar to settle it, which notice may be served through the post. The solicitors of the other parties procure from the Registrar's clerk copies of the draft order, and attend the appointment in the Registrar's Chambers, produce their counsel's briefs, and any other necessary papers, and the Registrar then, in their presence, settles the judgment. If any party is not satisfied that it carries out the true order of the Court, he can bring it before the Court on a motion to vary the minutes. After it is finally settled it is engrossed, and notice of a further appointment given to pass it, which is usually a merely formal appointment at which the different solicitors examine the engrossment of the judgment, and see there are no inaccuracies in it, and approve it. If any dispute, however, should arise, recourse may be again had to the Registrar. The judgment being passed, it is stamped and filed, and a duplicate is delivered to the solicitor having the carriage of the proceedings (*aa*). Orders which are to be acted upon by the Paymaster require to be printed, or, in cases in which printed forms can be used, may be partly in print and partly in writing (*b*).

Notice to settle.

Motion to vary minutes.

Notice to pass.

Entering judgment.

We have now, so far, gone through the details of an ordinary action in this Division, taking it that it is a contested action; but many Chancery actions are of a friendly nature, being more of an administrative than of a contentious character; or although there may at some subsequent period be contention, yet not at this stage. For instance, in an administration suit by a

Friendly actions.

(*aa*) Order LXII. r. 1.

(*b*) See generally hereon, Order LXII., and Supreme Court Funds Rules, 1894, r. 23.

residuary legatee under a will, he is, if it is a proper case for the Court's interference (*c*), entitled as a matter of course as against the executor, to a judgment directing the usual accounts and inquiries, and there is nothing therefore for the defendant, the executor, to oppose at this stage, although subsequently in Chambers there may be many contentious points, and there may also be matters to be determined at the final hearing on further consideration. In such cases as this the action is brought on by motion for judgment, and provided also that the case involves no question of difficulty, and is not likely to take up much time in argument, a specially speedy method of getting a judgment exists—viz., by having the cause heard as a short cause.

Short cause.

Minutes to be prepared.

If it is desired that a cause shall be heard "Short" the practice is for the plaintiff's solicitor to prepare minutes (which are usually settled by his counsel) of what judgment he proposes the Court shall be asked to pronounce on the hearing of the motion for judgment, and to submit them to the defendant's solicitor, and they are then usually considered and settled by his counsel. These minutes being agreed upon between the parties, the plaintiff's solicitor gets from his junior counsel a certificate that the cause is one fit to be heard short (*d*). The cause being set down to be heard and marked "Short," it comes on very speedily, being placed in the paper on the first available short cause day, there being a special day appropriated by

Certificate that cause fit to be heard short.

(*c*) It must be a proper case, for it is not obligatory on the Court to make an order for administration if the questions between the parties can properly be determined without it (Order L.V. r. 10); and this is so even although the plaintiff is an infant. (*Jones v. Blake*, 29 Ch. D. 913; 33 W. R. 886.) Besides this, to save the expense of administration by the Court where it may perhaps be avoided, provision has been made under which, on any application for administration or execution of trusts, the application may be ordered to stand over so that accounts may be rendered, or an order for administration may be made with a proviso that no proceedings are to be taken thereunder without leave of the Judge in person. (Order L.V. r. 10a.)

(*d*) The rule in practice is that the cause should be one which will not occupy more than about ten minutes of the Court's time. No fee is paid to counsel for a certificate that the cause is fit to be heard "Short."

each Judge in every week for the hearing of short causes (*e*), and judgment is thus obtained in a very short space of time, whereas, but for this special mode of procedure, months would probably elapse. The judgment being pronounced, it is drawn up as before mentioned (*f*). No evidence is received on the hearing of a cause short, the plaintiff is simply entitled to judgment on the admissions in the pleadings (*g*).

The judgment being thus in existence, whether from an ordinary hearing on notice of trial or on motion for judgment, or from a hearing as a short cause, the next subject to be considered is that of the proceedings thereunder in Chambers, which is dealt with in the next chapter.

It may be convenient here to notice one particular kind of action in which there are no proceedings in Chambers, and which indeed is not set down for trial (*h*), and that is an action to perpetuate testimony, a procedure which, though of rare practical occurrence, is by no means obsolete, and which is now entirely regulated by the rules of 1883 (*i*). It is an action brought by a person who alleges that he will at a future day be entitled to some estate, property, honour, title, dignity, or office, and it asks that the evidence may be taken and preserved (*j*). It must be shewn that it is necessary to so perpetuate testimony (*k*), and to entitle

Procedure
after judgment.

Action to
perpetuate
testimony.

What it is.

As to after-
wards using
the evidence.

(*e*) Before a short cause comes on to be heard certain necessary papers must be left with the Judge's secretary—viz., a set of the pleadings, if any, and if not, a copy of the writ, and also two copies of the proposed minutes of judgment.

(*f*) Ante, p. 198. The details of practice given above only apply to the Chancery Division. As to Short Causes in the Queen's Bench Division, see ante, pp. 69, 136.

(*g*) *Smith v. Buchan*, 36 W. R. 631. See generally as to Short Causes notes to Order XL. r. 1, in Annual Practice, (1897) 791.

(*h*) Except perhaps upon the question of costs, post, p. 202.

(*i*) Order XXXVII. rr. 35–38. The statute 5 & 6 Vict. c. 69, which formerly chiefly governed the subject, was repealed by the Statute Law Revision Act, 1883 (46 & 47 Vict. c. 49).

(*j*) Order XXXVII. r. 35.

(*k*) *Earl Spencer v. Peel*, L. R. 3 Eq. 415.

When the
Crown
interested
Attorney-
General made
a party.

the party afterwards to use evidence so taken he must (unless the other party consents) shew that the deponent is dead or beyond the jurisdiction of the Court, or unable, from sickness or other infirmity, to attend the trial (*l*). If the Crown has any interest in the matter in respect of which it is sought to preserve the evidence, the Attorney-General should be made a party to the action to perpetuate testimony, otherwise an objection to the reception of the evidence may be made on the ground that the Crown was not a party to the action (*m*). The costs of an action to perpetuate testimony are, as in other actions, in the discretion of the Judge (*n*), and it would seem that unless the defendant will consent to the costs being dealt with on an interlocutory application, the plaintiff is entitled to bring the action to trial for the purpose of determining the question of costs (*o*). It may, however, be stated that the usual rule is that the plaintiff pays the costs of such an action, unless the defendant has taken advantage of the proceedings to perpetuate evidence on his own behalf, when each party pays his own costs.

(*l*) Order xxxvii. r. 18.

(*m*) Ibid. r. 36.

(*n*) Order lxv. r. 1. See ante, p. 171.

(*o*) Daniel's Ch. Pr. 6th ed. 1515.

CHAPTER II.(a)

PROCEEDINGS IN CHAMBERS UNDER THE JUDGMENT.

THE first step toward proceeding in Chambers under a judgment or order directing accounts and inquiries to be taken and made, is for the plaintiff's solicitor to make a copy of the judgment or order, certifying on it that it is a true copy, and then carry the same into the Judge's Chambers, and at the same time lodge there a note stating the names of the solicitors for all parties, and for which of the parties such solicitors are respectively concerned (b). He then takes out a summons to proceed on the judgment or order, and serves the same upon the other solicitor or solicitors in the action. If he does not do this within ten days after the passing and entering of the judgment, any other party to the cause or matter may do so (c).

At the return of the summons the solicitors attend before the proper Master (d), in the Judge's Chambers, who should first satisfy himself that he has all necessary parties (e) before him or that they have all been served with notice of the judgment (f), and if not he

(a) On the subject of this chapter generally, and on any points occurring in it as to which no reference is given, and on which the student is desirous of further information, he is referred to Order LV., and the notes thereunder in the Annual Practice, (1897) 991-1037.

(b) Order LV. r. 28.

(c) Ibid. rr. 30, 32.

(d) As to this officer (formerly styled Chief Clerk), see ante, pp. 23, 24.

(e) It may be mentioned that in a cause or matter to execute the trusts of a will, it is not necessary to make the heir-at-law a party, but the plaintiff is at liberty to make the heir-at-law a party when he desires to have the will established against him. Order XVI. r. 45.

(f) Order XVI. r. 40. Order LV. r. 33.

What proceedings can be taken before this.

should direct them to be so served, and until after this is done he cannot proceed except to the extent of giving directions for insertion of advertisements for creditors, and for leaving accounts in Chambers, it being provided that the adjudication on creditors' claims, and the accounts, are not to be proceeded with, and no other proceeding is to be taken except for the purpose of ascertaining the parties to be served, until all necessary parties have been served and are bound by the proceedings, or service shall have been dispensed with, and until direction shall have been given as to the parties who are to attend on the proceedings (*g*). Thus, in administration suits, the action may be brought by one of several residuary legatees, though of course the others have equal rights with him, and here it would be necessary to serve them all with notice of the judgment. Also in most cases of administration, and execution of trusts, it is not necessary to make all persons interested parties to the proceedings (*h*), but they are afterwards served with notice of the judgment. After all persons interested have been thus served, they are bound by the proceedings, as if they had been originally made parties, and are at liberty to attend the proceedings, and may within one month after service, or in case of service out of the jurisdiction within such time as the Judge may direct, apply to the Court or a Judge to discharge, vary, or add to the judgment or order (*i*). The service is effected by giving the party a written notice setting out the judgment, and on it is indorsed a memorandum that he will become bound by it, but may apply to vary it within a month, and that he may enter an appearance and attend the proceedings (*j*). If the party to be served is an infant or person of unsound mind not so found by inquisition, service on

Effect of service of notice of judgment.

How served.

Service on infants.

(*g*) Order xvi. r. 40; Order lv. r. 36.

(*h*) Order xvi. rr. 33-39.

(*j*) Ibid. rr. 42, 43.

(*i*) Ibid. r. 40.

such person is effected in the same way as has been pointed out with regard to a writ of summons (*h*).

No person served with notice of a judgment need obtain an order for liberty to attend proceedings, but is at liberty to attend them upon entering an appearance in the Central Office in the same way as if he were a defendant (*l*); and the Judge may (if he thinks fit) require a guardian *ad litem* to be appointed for any infant, or person of unsound mind not so found by inquisition, who has been served with notice of judgment (*m*). It does not, however, follow that every person served has a right to attend proceedings at the expense of the particular estate or fund in question, for with regard to any party's attendance generally—and this applies not merely to parties attending proceedings but to original parties also—it is provided that where the Judge considers the interests of the parties can be classified, he may require the parties constituting each or any class, to be represented by the same solicitor, and he may direct what parties may attend all or any part of the proceedings; and where the parties constituting any class cannot agree upon the solicitor to represent them, the Judge may nominate a solicitor to so act, and where any one of the parties constituting such class declines to authorize the solicitor so nominated to act for him, and insists upon being represented by a different solicitor, such party shall personally pay the costs of his own solicitor of and relating to the proceedings before the Judge with respect to which such nomination shall have been made, and all such further costs as shall be occasioned to any of the parties by his being thus represented separately (*n*). If no such classification order has been made, or if any person was served with notice of judgment after the making of a classification order, any person so served should, if he

Appearance of persons served with notice of judgment.

Classification order.

Summons for leave to attend proceedings.

(*h*) Order xvi. r. 44; ante, p. 48.

(*l*) Ibid. r. 41, ante, pp. 55, 56.

(*m*) Order lv. r. 27.

(*n*) Ibid. r. 40.

desires to attend at the expense of the estate or fund, take out a summons for that purpose, when an order may be made if it appears proper (o).

Dispensing
with service of
notice of
judgment.

Where upon the hearing of the summons to proceed it appears to the Judge that by reason of absence or for other sufficient cause, the service of the notice of the judgment or order upon any party cannot be made, or ought to be dispensed with, the Judge may, if he thinks fit, wholly dispense with such service, or may at his discretion order any substituted service, or notice, by advertisement or otherwise, in lieu of such service(*p*), and in such a case the Judge *in person* may, if he thinks fit, order that the persons as to whom service is dispensed with, shall be bound as if served, and they shall be bound accordingly, except where the judgment or order has been obtained by fraud or non-disclosure of material facts (*q*).

Power to
appoint persons
to represent
absent parties.

In addition to this it is also provided that in any case in which the rights of an heir, or customary heir, or the next of kin, or a class, shall depend upon the construction of an instrument, or are in any way involved, and it shall not be known or shall be difficult to ascertain who they are, and to save expense it is nevertheless convenient at once to determine the matter, the Court or a Judge may appoint some one or more persons to represent any such persons, and the judgment shall then be fully binding (*r*).

Procedure
when
numerous
parties.

Furthermore, it is convenient to here notice as to parties to proceedings in the Chancery Division, that it is provided that where there are numerous persons having the same interest, one or more of such persons may sue or be sued, or may be authorized by the Court or a Judge to defend on behalf or for the

(o) Order LV. r. 52.
(q) Ibid. r. 35a.

(p) Ibid. r. 35.
(r) Order XVI. r. 32.

benefit of all persons so interested (s). And where in proceedings affecting a trust, a compromise is proposed, and some of the persons interested are not parties, but there are other persons in the same interest before the Court and assenting to the compromise, the Court or a Judge if satisfied that the compromise will be for the benefit of the absent persons, and that to require service on such persons would cause unreasonable expense or delay, may approve the compromise, and order that the same shall be binding on the absent persons, and they shall be bound accordingly, except where the order may have been obtained by fraud or non-disclosure of material facts (t).

Compromise
in absence of
parties
interested.

The matter of parties having thus received the attention of the Master, he next gives directions as to the manner in which, and by whom, each of the accounts and inquiries is to be prosecuted, the evidence to be adduced in support thereof, the time within which accounts are to be brought in and inquiries answered, and generally he gives all necessary directions, and appoints a day for further attendance before him. To properly understand these proceedings in Chambers, however, it will be best to take as an instance one particular kind of action and follow it throughout,—say an ordinary administration action against an executor or administrator (u). In noticing the main points in this one instance, the student must bear in mind that although it is but an instance, yet it shews the general details of the working out of a judgment in Chambers in any case, the only practical distinction being that different kinds of cases involve different

Directions
given on
summons to
proceed.

(s) Order xvi. r. 9. This rule only extends to persons having or claiming some beneficial proprietary right which they are asserting or defending. (*Temperton v. Russell*, (1893) 1 Q. B. 435; 62 L. J. Q. B. 412; 68 L. T. 425.)

(t) *Ibid.* r. 9a.

(u) In the Appendix II. hereto, post, p. 317, is given a form of an administration judgment or order containing the most usual accounts and inquiries in an ordinary administration action.

accounts and inquiries, and to particularize individual cases is beyond the scope and object of the present work. If the student understands one case thoroughly that is sufficient, for the general practice is always the same (*v*).

Instance of an administration action.

To take, then, the instance of an ordinary administration action just mentioned. At the return of the summons to proceed, the Master directs the plaintiff's solicitor to insert an advertisement in certain newspapers, for creditors to come in and prove their claims. This advertisement is always directed to be inserted once in the *London Gazette*, and usually twice in *The Times* and some one other chief London morning daily newspaper, and if a country case, also twice in two local papers (*w*).

Advertisement for creditors.

Questions of pedigree.

If there is any question of pedigree involved, advertisements may also be directed to be inserted (*x*), and the Master directs the plaintiff, or any other party who may have better knowledge of the matter, to bring in evidence thereon by a certain day, and he also directs the accounts of the defendants, the personal representatives, to be brought in duly verified by affidavit, and any other necessary facts to be proved by affidavits to be filed by a certain day.

Accounts.

Carrying out the Master's directions.

The next thing is for the respective solicitors to proceed to carry out the directions given by the Master,

(*v*) With regard to administration proceedings it may be noticed that it has been decided that where a testator domiciled in Scotland dies possessed of personal estate situate partly in Scotland and partly in England, and having by a will made in Scotch form appointed persons executors and trustees, some of whom reside in England and some in Scotland, a legatee residing in England is entitled to judgment here for unlimited administration of the estate, unless proceedings are already pending in the Scotch Court for administration (*Ewing v. Orr-Ewing*, 9 App. Cas. 34; 53 L. J. Ch. 435; 32 W. R. 573).

(*w*) Order LV. rr. 44-48. Where the personal representative has already issued advertisements under 22 & 23 Vict. c. 35, s. 29, no further advertisements are generally directed to be issued.

(*x*) Order LV. r. 44.

so as to be ready to proceed at the appointment which has been given for further attendance before him. The plaintiff's solicitor prepares and signs the advertisement for creditors to come in and prove their claims, which is then inserted in the various papers as directed, and no signature by the Master is necessary as is the case with regard to advertisements for other claimants, *e.g.*, next of kin (*y*). This advertisement for creditors is in an established form (*z*), and requires all claims to be sent in by a certain day (usually within one month) to the solicitor for the defendants, the personal representatives. It also names a day for all claimants to appear before the Master, which is called an appointment to adjudicate on claims; yet no creditor need make any affidavit in support of his claim, or attend the appointment except to produce his security, unless he is served with a notice requiring him to do so (*a*), but an affidavit is made by the personal representative or his solicitor or both (*b*) seven days prior to the appointment to adjudicate on claims, stating what claims have been sent in, and which it is considered should be admitted and which not, and the reasons for this. Then, if necessary, directions may be given for any persons claiming to be creditors to prove their debts strictly, and the appointment to adjudicate on claims may be adjourned for this purpose, and such creditors must have seven days' notice of the time to which the appointment has been adjourned, service of such notice through the post directed to the address given in the claim, or the address of the solicitor mentioned in the claim (if any), being sufficient. If no claims have been sent in under the advertisement, an affidavit of no claims is made (*c*).

Preparing and inserting advertisement for creditors.

Appointment to adjudicate on claims.

Affidavit of claims.

Affidavit of no claims.

A creditor who is required to prove his claim does

Proof by creditor of his claim.

(*y*) Order LV. rr. 46, 46a.

(*z*) Ibid. r. 47, and forms 2 and 3 in Appendix L. to Rules of 1883.

(*a*) Order LV. rr. 49, 50.

(*b*) See form in Appendix II. hereto, post, p. 318.

(*c*) Order LV. rr. 52-56, 61.

so by affidavit in the ordinary way; he is not, however, required to take an office copy, but the person who examines the claim takes the office copy (*d*). A deponent may be cross examined on an affidavit in support of a claim (*e*), and his attendance for that purpose may be enforced by *subpoena* (*f*). This examination usually takes place before one of the Examiners of the Court, though it may be before the Master (*ff*). If the creditor establishes his claim an amount for his costs of proving it is usually fixed by the Master, but the costs may be directed to be taxed, and the amount of the costs is added to the debt established (*g*). There is also added to the debt interest thereon at such rate (if any) as the party may be entitled to, and in other cases at 4 per cent. per annum calculated from the date of the administration judgment or order; and any creditor whose debt does not carry interest gets his 4 per cent. interest if sufficient assets remain after satisfying the costs of the cause or matter, the debts established, and the interest on such debts as by law carry interest (*h*). After the time fixed by the advertisement no claims are received, except by special leave on application made by summons, and then upon such terms and conditions as to costs and otherwise as the Judge thinks fit (*i*). If a creditor fails in his claim he may be ordered to pay costs, but it seems a special summons must be taken out for that purpose (*j*).

Costs of proving claim. Master (*ff*). If the creditor establishes his claim an amount for his costs of proving it is usually fixed by the Master, but the costs may be directed to be taxed, and the amount of the costs is added to the debt established (*g*). There is also added to the debt interest thereon at such rate (if any) as the party may be entitled to, and in other cases at 4 per cent. per annum calculated from the date of the administration judgment or order; and any creditor whose debt does not carry interest gets his 4 per cent. interest if sufficient assets remain after satisfying the costs of the cause or matter, the debts established, and the interest on such debts as by law carry interest (*h*). After the time fixed by the advertisement no claims are received, except by special leave on application made by summons, and then upon such terms and conditions as to costs and otherwise as the Judge thinks fit (*i*). If a creditor fails in his claim he may be ordered to pay costs, but it seems a special summons must be taken out for that purpose (*j*).

Interest. Proving debt after proper time. Creditor may be ordered to pay costs. Attendance on claims.

In any cause or matter for the administration of the estate of a deceased person, no party to the cause other than the executor or administrator is, unless by leave of the Court or a Judge, entitled to appear either in Court or in Chambers on the claim of any person not a party

(*d*) Order LV. r. 48.

(*e*) *Cast v. Poyser*, 2 Sm. & G. 269.

(*f*) Order XXXVII. r. 20.

(*ff*) See ante, p. 24.

(*g*) Order LV. r. 58.

(*h*) Ibid. rr. 62, 63.

(*i*) Ibid. r. 57.

(*j*) Notes to Order LV. r. 58 in Annual Practice, (1897) 1029.

to the cause, against the estate of the deceased in respect of any debt or liability. The Court or a Judge may direct any other party to the cause to appear either in addition to or in the place of the executor or administrator, upon such terms as to costs or otherwise as they or he shall think fit (*k*).

If, as suggested in our instance, there is any point as to pedigree, an affidavit is made by the plaintiff, or some person conversant with the facts, proving any marriages, births, and deaths necessary under the circumstances to be proved. The affidavit should have exhibited to it the certificates of the respective marriages, births, and deaths; and, in addition to this, for the sake of convenience, it is usual to prepare and carry into Chambers a pedigree which shews at a glance the position as proved by the affidavits. At the adjourned appointment before the Master, the affidavits, &c., are considered, and what is proved duly noted down by him. It may be that he is satisfied that the evidence adduced properly answers the inquiry, or it may be that he directs some further evidence to be obtained, or advertisements to be inserted for next of kin, in which case the appointment is then adjourned, and so on, from time to time, until he is satisfied.

Proceedings
on questions
of pedigree.

Advertise-
ments for next
of kin.

Any person claiming unsuccessfully as next of kin or heir-at-law may in the Judge's discretion be ordered to pay costs occasioned by his claim (*l*). Generally with regard to costs on claims made in a Chancery suit, it is provided that the costs occasioned by any unsuccessful claim, or unsuccessful resistance to any claim, to any property shall not be paid out of the estate unless the Judge shall otherwise direct (*m*), and that the costs of inquiries to ascertain the person entitled to any legacy,

Costs on
claims, and as
regards any
particular
shares.

(*k*) Order xvi. r. 47.

(*l*) *Knight v. Gardner*, 57 L. T. 238.

(*m*) Order lxxv. r. 14a.

money, or share, or otherwise incurred in relation thereto, shall be paid out of such legacy, money, or share, unless the Judge shall otherwise direct (*n*).

Affidavit by personal representatives on accounts and inquiries.

Then as to accounts—these are duly prepared by the solicitor of the personal representatives. They must be in proper form, the items on each side being numbered consecutively, and they are then exhibited to an affidavit by the personal representatives verifying them (*o*); and in addition, the affidavit, to satisfy other requirements of the judgment, ordinarily states the amount of the deceased's funeral expenses, and gives in two schedules statements of what his estate consisted at the time of his decease, and of what it consists at that time. The accounts are lodged in the Judge's Chambers, and then, together with the affidavit (*p*) verifying them, are laid before the Master at the appointment which has been given before him. The affidavit at once answers any inquiry in the judgment of what the funeral expenses amounted to, of what the estate consisted at the deceased's death, and of what it consists then; and the Master having seen that the affidavit and accounts are in proper form refers the latter to one of his junior clerks for the purpose of the items therein being vouched.

Lodging affidavit and accounts at chambers.

Vouching accounts.

The plaintiff's solicitor then obtains an appointment before the proper official in the Judge's Chambers, being a clerk under the Master, to vouch the accounts. At the day appointed the solicitors attend, and the solicitor for the personal representatives proceeds to vouch by producing all necessary vouchers, such as receipts, &c. Where any item of payment is under forty shillings, no voucher is required unless specially insisted on by the other side, the oath of the accounting party being considered sufficient (*q*). Special

(*n*) Order LXV. r. 14b.

(*o*) Order XXXIII. r. 4.

(*p*) See a form in Appendix II. hereto, post, p. 319.

(*q*) Daniel's Ch. Pr. 6th ed. 1051.

directions may be given by the Court or a Judge as to the mode in which accounts are to be taken and vouched, and generally with regard to them (*r*); and in particular it is provided that it may be directed that the vouchers shall be produced at the office of the solicitor of the accounting party, or at any other convenient place, and that only such items as may be contested or surcharged shall be dealt with in chambers (*s*).

Any party who is dissatisfied with the accounts may enter into evidence to shew that certain moneys have been received which are not accounted for, which is called surcharging; or that certain items of payment are wrongly inserted, which is called falsifying. The official at the appointment, or any adjournment thereof, disposes of the accounts as far as he is able; and if there are then any items not properly vouched, or the propriety of which is objected to, he queries the same for the Master. On any such queries an appointment is obtained before the Master, and he considers the same and disposes of them (*t*).

Surcharging and falsifying.

Queries on accounts.

The Judge in Chambers may, in such way as he thinks fit, obtain the assistance of accountants, merchants, engineers, actuaries, and other scientific persons, the better to enable any matter at once to be determined, and he may act upon the certificate of any such person (*u*).

Assistance of experts.

Taking it, then, that the accounts are disposed of, and all inquiries directed by the judgment duly answered, the next step is the preparation of the Certificate, which is a document whereby the Master specifically states or certifies to the Court the result of the accounts and inquiries that have been referred to

Master's certificate.

(*r*) Order xxxiii. r. 3.

(*s*) Ibid. r. 4a.

(*t*) See generally as to accounts, Order xxxiii.

(*u*) Order lv. r. 19. Re *Hutchinson*, W. N. (1884) 35; 32 W. R. 392.

Adjourning
for certificate.

him (*v*). The Master being satisfied that everything necessary has been done, on being requested so to do, adjourns the proceedings for the certificate. The parties' solicitors then leave with one of the officials (a clerk under the Master) at Chambers, whose duty it is to prepare certificates, all necessary documents, such as office copies of affidavits, &c., and from these documents and the notes of the proceedings in Chambers, this official prepares the draft certificate. However, the Judge may direct the solicitor of one of the parties to prepare the draft certificate (*w*).

Settling
certificate.

The draft certificate being prepared, an appointment is obtained before the proper official (a clerk under the Master) to settle it, and no summons is necessary for this purpose. The solicitors then attend; the certificate is gone carefully through, and any queries on it disposed of as far as possible, either at this appointment or any adjournment that may be necessary, and an appointment is then obtained before the Master, who finally goes through it and disposes of any queries that may yet remain; and any party may, before the proceedings before the Master are concluded, take the opinion of the Judge upon any matter arising in the course of the proceedings, which is done by requesting the Master to adjourn the matter to the Judge (*x*). The certificate is ultimately engrossed and signed by the Master and is then complete, no signature by the Judge being necessary, and it is then filed (*y*).

Taking
opinion of
Judge.

Certifying
legacies and
interest
thereon.

In all actions for the administration of a testator's

(*v*) Order LV. r. 65.

(*w*) Ibid. rr. 66-68.

(*x*) Order LV. r. 69. This applies to all proceedings in the Chancery Chambers, and the generally established practice is that an adjournment to the Judge must be asked for at the time of the decision of the Master on any matter, or else time must be asked for the party to consider whether he will go to the Judge. It appears, however, though this is the practice, that it is the absolute right of a suitor to go to the Judge himself at the risk of costs, at any time before a Master's order or certificate is completed (*Scott v. Homer*, 60 L. J. Ch. 238; 63 L. T. 618).

(*y*) Order LIX. rr. 65, 70.

estate, there is an inquiry in the judgment as to legacies. This inquiry is of course answered by reference to the probate of the will; and in the Master's certificate (which amongst other things certifies the legacies), assuming the estate to be solvent, interest is computed and certified thereon after the rate of 4 per cent. per annum from the end of one year after the testator's death unless otherwise ordered, or unless any other time of payment or rate of interest is directed by the will, and in that case according to the will (z).

But notwithstanding the Master's certificate is thus made and filed, there is yet a course open to a party dissatisfied in any respect with it—viz., to take out a summons (a) to vary it, which must be done within eight days after the filing, and if the application is not made within that time, the certificate is binding on all parties, unless indeed by special leave the matters are reopened, a course which will only be allowed on some very strong case being made out (b). On the return of the summons to vary, it is not usually dealt with in Chambers, but is adjourned into Court; and as the cause will now be, usually, about to come on for final hearing on further consideration, it is generally adjourned to come on at the same time, so that it in fact forms part of the hearing on further consideration, and it is provided that in such case the time to appeal shall be the same as the time to appeal against the order on further consideration (c), viz., three months (d).

Application to vary certificate.

When certificate binding.

Time to appeal from decision on summons to vary certificate.

This concludes the ordinary proceedings in Chambers, and even at the risk of repetition it would seem

Conclusion of ordinary proceedings in Chambers.

(z) Order LV. r. 64. As to when a legacy carries interest from the date of the testator's death, see Indermaur's Manual of Equity, 3rd ed. 106.

(a) Re *Dove*, 27 Ch. D. 687; 53 L. J. Ch. 1099; 33 W. R. 197.

(b) Order LV. r. 70. The time to apply to discharge or vary any certificate to be acted upon in the Paymaster-General's Office without further order, or certificate on passing Receiver's accounts, is two clear days from filing (*Ibid.*).

(c) Order LVIII. r. 15a.

(d) Order LV. r. 15.

well to remind the student that this instance we have gone through should be sufficient to supply him with a general knowledge of the proceedings in Chambers, in working out any accounts and inquiries directed by any judgment. The accounts and inquiries may all be different in their nature, but still the steps are substantially the same, the proceedings in Chambers always concluding with the Master's certificate, after which comes the order on further consideration. Thus, for instance, take a partnership action: the first judgment decrees dissolution and directs the partnership accounts to be taken, which is done in Chambers, the result being stated in the Master's certificate, and then the order on further consideration winds up the whole matter. So also the procedure is practically the same in a partition action. It may be noticed that in a partition action, instead of directing a partition, the Court may in any case, if it thinks fit, direct a sale (*e*), and if parties interested to the extent of a moiety or upwards request a sale, then the Court must direct a sale unless it sees good reason to the contrary (*f*). Parties interested not desiring a sale may usually prevent one by undertaking to purchase the share of the party desiring a sale (*g*). All persons interested in the property need not be made parties to the partition action, but may instead be served with notice of the partition judgment or order, and may then have liberty to attend the proceedings, and may apply to the Court to add to the judgment or order (*h*). The Court has, however, power to dispense with the service of notice of the judgment or order, if shown that it cannot be served, or that service cannot be effected without expense disproportionate to the value of the property, and may instead direct advertisements to be inserted requiring the parties not served to come in and establish their claims (*i*). Where service is thus dispensed

The one instance of an administration action exemplifies all proceedings in Chambers.

Partnership action.

Partition action.

Provisions of Partition Acts, 1868 & 1876.

Notice of partition judgment.

Payment into Court of proceeds of sale.

(*e*) 31 & 32 Vict. c. 40, s. 3.

(*f*) Ibid. s. 4.

(*g*) Ibid. s. 5; 39 & 40 Vict. c. 17, s. 6.

(*h*) 31 & 32 Vict. c. 40, s. 9.

(*i*) 39 & 40 Vict. c. 17, s. 3.

with, and the property is sold, the proceeds of sale are paid into Court, and the Court fixes a time for distribution, and directs that notices shall be given by advertisement, or otherwise, previous to distribution, and the Court may then, at the expiration of any time fixed, proceed to deal with and distribute the proceeds, and any persons whose rights are not shown to the Court, are then excluded from participation, but may nevertheless recover from any other person any portion of his share received by him (*j*).

If in the course of any proceedings in Chambers it becomes necessary to compel the attendance of a witness before the Judge or Master, this may be done by means of a summons, which requires to be served personally like a subpoena, and disobedience to it may be punished as a contempt of Court (*k*). Compelling attendance of witness before Master.

Where in the prosecution of a judgment or order it appears to the Judge expedient that further accounts should be taken or inquiries made, he may order the same to be taken or made accordingly, or if desired by any party, may direct the same to be considered in open Court; but such accounts or inquiries must be auxiliary to, and not at variance with, the judgment pronounced by the Court. An application for such further accounts and inquiries is made by summons, which must be served on all parties, and also on persons who are attending the proceedings, and the additional accounts and inquiries should be numbered consecutively in continuance of the numbers of the original accounts and inquiries directed (*l*). Additional accounts and inquiries.

As to attendance in Judge's Chambers on accounts and inquiries, it is provided that where by reason of the non-attendance of any party, or by reason of Neglect to attend appointments, &c.

(*j*) 39 & 40 Viet. c. 17, s. 4. See further as to Partition, Indermaur's Manual of Equity, Part II. chap. ix.

(*k*) Order LV. rr. 16, 17.

(*l*) Order XXXIII. r. 2.

Master to
report delay.

neglect in not being prepared with any proper evidence, accounts, or other proceedings, the appointment is adjourned without any useful progress being made, the Judge may order such an amount of costs (if any) as he shall think reasonable to be paid to the party attending, by the party so absent or neglectful, or by his solicitor personally, and the party so absent or neglectful is not to be allowed any fee as against any other party, or any estate or fund in which any other party is interested (*m*). To further prevent unnecessary delay it is also provided that each Master shall at the beginning of every sittings report to the Judge to whose chambers he is attached, all the cases in which he considers that there has been any undue delay in the proceedings before him (*n*).

Sales under
the Court.

Before concluding this chapter it seems advisable to specially refer to the proceedings in Chambers in the case of a sale under the Court (*o*), as this very often forms an important part of the working out of a judgment or order, as it may direct a sale of certain property (*p*).

Special points.

The peculiarities in a sale under the Court are mainly these :—On the return of the summons to proceed with the sale, the Master first directs who is to have the conduct of the sale, and this will usually be the plaintiff's solicitor, subject to this, that whenever

Conduct of
sale.

(*m*) Order LXV. r. 27 (13).

(*n*) Order XXXIII. r. 8b.

(*o*) It has been considered best to notice this matter here, although it might have been treated of in chap. iii. as an interlocutory proceeding, as a sale may be directed by some interlocutory order. The proceedings, however, are in both cases identical.

(*p*) A direction for sale may be contained in a judgment or in an interlocutory order (Order LI. r. 1), and it is provided that in debenture holders' actions, where the debenture holders are entitled to a charge by virtue of the debentures, or of a trust deed or otherwise, and the plaintiff is suing on behalf of himself and other debenture holders, and where the Judge *in person* is of opinion that there must eventually be a sale, he may in his discretion direct a sale before judgment, and also after judgment, before all the persons interested are ascertained, and whether served or not (Order LI. r. 1b.).

in an action for the administration of the estate of a deceased person, or execution of the trusts of a written instrument, a sale is ordered of any property vested in any executor, administrator, or trustee, the conduct thereof is given to the executor, administrator, or trustee, unless the Court or a Judge otherwise directs (*q*). The Master refers the abstract of title to one of the conveyancing counsel of the Court (*r*), whose duty it is to report on the title and prepare conditions of sale, which are afterwards approved by the Master, who then appoints the day of sale, and directs an advertisement of the sale to be inserted in the *London Gazette* and such other newspapers as the auctioneer to be appointed may think advisable, and he also appoints some person to be the auctioneer, on an affidavit of his fitness, and on his giving security for the deposit he will receive (*s*), and settles his remuneration. He then fixes the reserved biddings, being guided in so doing by the affidavit of a surveyor (*t*), and these reserved biddings are sealed up and delivered to the auctioneer, not to be opened until the time of the sale. After the sale, its result is shown by the particulars of sale being signed by, and the result of the sale certified under the hands of, the auctioneer and the solicitor of the party having the conduct of the sale, and no affidavit verifying the particulars or the result of the sale is necessary. The auctioneer then pays the deposit received by him into Court, and the balance of the purchase-money is paid into Court by the purchaser under a direction contained in a lodgment schedule signed by the Master, which is obtained by the purchaser at his own expense,

Abstract sent to one of the Conveyancing counsel of the Court.

Appointment of auctioneer.

Fixing reserved biddings. How result of sale shewn.

Mode in which purchase money paid into Court.

(*q*) Order L. r. 10.

(*r*) Order LI. r. 2. As to these officers see ante, p. 26, and Order LI. rr. 7-13.

(*s*) Usually a bond with two sureties (or a Guarantee Society) in double the amount of the anticipated deposit, but if the deposit will probably not exceed £200, the practice is to be satisfied with the auctioneer's undertaking alone. As to the security of a Guarantee Society, see post, p. 228, note (*mm*).
(*t*) Order LI. r. 4.

by a day named in the conditions of sale. Such lodgment schedule signed by the Master may also contain a direction that the money paid in shall not be dealt with without notice to the purchaser or other person named therein, which direction operates as a stop order (*u*). After the payment in, the conveyance to the purchaser is executed, and the matter completed. If any disputes arise on the form of the conveyance, they may be disposed of in Chambers in the action (*v*). On completion of the purchase, a written consent should be obtained from the purchaser that the purchase-money may be dealt with as the Court may direct; and such consent should comprise an authority to the solicitor for the party having the conduct of the proceedings to appear for the purchaser in any proceedings in the suit to signify his consent.

Consent to
deal with
deposit.

Leave to bid.

A party to the action cannot bid at a sale except by leave of the Court, which is obtained by summons. The Court will not give leave to a receiver to bid, nor will it give leave to the party having the conduct of the sale, nor generally to a trustee, executor, or administrator.

Sale, partition,
&c., out of
Court.

It is now provided that in all cases where a sale, mortgage, partition, or exchange is ordered, the Court or a Judge shall have power to authorise the same to be carried out by proceedings out of Court, any moneys produced thereby being paid into Court, or to trustees, or otherwise dealt with as the Judge in Chambers may order (*w*). It is, however, provided that the Judge shall not authorise the said proceedings altogether out of Court unless and until he is satisfied by such evidence as he shall deem sufficient, that all persons interested in the estate to be sold, mortgaged,

Special condi-
tions attached
to such cases.

(*u*) Order LI. r. 3a; Supreme Court Funds Rules 1894, r. 5. As to a stop order generally, see post, pp. 236, 237.

(*v*) Ibid. rr. 1-6a; Daniel's Ch. Pr. 1071-1110

(*w*) Ibid. r. 1a.

partitioned, or exchanged, are before the Court, or are bound by the order for sale, mortgage, partition, or exchange; and every order authorising the said proceedings altogether out of Court shall be prefaced by a declaration that the Judge is so satisfied, and a statement of the evidence upon which such declaration is made (x).

(x) Order LI. r. 1a.

CHAPTER III.

INTERLOCUTORY PROCEEDINGS.

IN Part II. chapter iv., under the same heading as this chapter, various interlocutory proceedings have been dealt with which are applicable not only to the Queen's Bench Division, but equally to the Chancery Division—such, for instance, as discovery. The interlocutory proceedings mentioned in the present chapter are those that would more usually only occur in the Chancery Division.

Petitions.

Interlocutory applications are made either by petition, motion, or summons. A petition is a written application to the Court containing a statement of facts, and praying for a certain order, and every petition states at its foot the names of the persons on whom it is proposed to serve it, who are called the respondents (*a*). The petition is lodged at the Registrar's office, and being thus presented is answered by a direction, in the name of the senior Registrar (*b*), for the parties to attend on the day appointed for its hearing, which is called the fiat, and a copy of the petition with this fiat thereon is served on the solicitors for the respective respondents two clear days before the day appointed for hearing (*c*). Counsel are then instructed, and it comes on to be heard in due course, when the Court makes such order as may be just. It is a rule that all unopposed petitions are heard prior to those which are opposed (*d*).

Fiat.

(*a*) Order LII. r. 16.

(*b*) Ibid. r. 18.

(*c*) Ibid. r. 17.

(*d*) Daniel's Ch. Pr. 6th ed. 1568-1569.

It does not always follow that because a party is served with a petition he is justified in incurring the expense of appearing by counsel at the hearing, for in many cases the respondents may be merely formal parties, and the Court can always in the exercise of its general discretion as to costs, decline to allow the costs of persons appearing unnecessarily. It is also specially provided that, when a petition is served, notice may be given to the party so served that in case of his appearance in Court his costs will be objected to, this notice being accompanied by a tender of £1 10s. for the respondent's costs of perusing the petition, which amount is allowed the petitioner in his costs, provided it was proper to adopt this course. This is, however, without prejudice to the rights of either party to costs, or to object to costs where no such tender is made, or where the Court or Judge shall consider the party entitled to appear in Court, notwithstanding such notice or tender. In any other case in which a solicitor of a party served with a petition, necessarily or properly peruses it without appearing thereon, he is allowed a fee of not exceeding £1 10s.(e).

Costs on petitions.

Formal respondents.

A motion is an application made to the Court without any written statement. A notice of motion is served upon the other parties to the action two clear days at least before the day named for its hearing (f), and this notice states that, on the day therein named, counsel will apply to the Court for a certain order, the effect of which is shortly stated. Counsel are then instructed on both sides, and the motion is in due course made (g). A motion is sometimes made *ex parte*, that is, on the application of one party without service of notice on any other party; but this only occurs usually when the matter is of some very pressing nature (h). For instance, if an injunction is sought

Motions.

Ex parte motions.

(e) Order LXV. r. 27 (19).

(f) Order LII. r. 5.

(g) Daniel's Ch. Pr. 6th ed. 1546-1561.

(h) Order LII. r. 3.

Ex parte
motion for an
injunction.

against some imminent act, directly the writ is issued the plaintiff may apply *ex parte* for an interim injunction until he has time to serve the defendant with notice of motion, and bring the same on (*i*). Interlocutory motions in the Chancery Division are not set down in a list, but are made by counsel in their order of seniority.

When appli-
cation to be by
petition, and
when by
motion.

Where any interlocutory application is authorised by the rules of Court to be made to the Court or a Judge, such application if made to a Judge in Court is always by motion (*j*); but subject to this there is not any fixed rule when applications should be made by motion and when by petition. It may, however, be stated, as a general rule, with regard to interlocutory applications to the Court, that when any long or intricate statement of facts is required, the application should be made by petition, whilst in other cases a motion is sufficient (*k*). Thus, an application to the Court for payment of a sum of money out of Court, should be made by petition (*kk*), whilst an application for an injunction is always made by motion.

Summons.

A summons is a written application made in a Judge's Chambers. Every application in Chambers not made *ex parte* is by summons, and every application for payment or transfer out of Court made *ex parte*, and every other application made *ex parte* which the Judge or proper officer shall think fit so to require, is also made by summons (*l*). The summons having been prepared, it is taken to the Judge's Chambers, where a day for its hearing is filled in, and it is sealed and placed in the list, and cannot afterwards be altered except on application at

(*i*) As to injunctions, see post, pp. 223, 224.

(*j*) Order LII. r. 1.

(*k*) Daniel's Ch. Pr. 6th ed. 1542.

(*kk*) As to when it may, however, be made in Chambers by summons, see ante, pp. 23, 24.

(*l*) Order LIV. rr. 1, 2.

Chambers (*m*). At its foot it is addressed to all necessary parties, and must be served on the respective solicitors at least two clear days before the day of hearing (*n*). It then comes on to be heard before the Master in Chambers (*o*), when the solicitors or their clerks appear before him and he deals with it. If any party is dissatisfied with the Master's decision on the summons, the Master at his request adjourns it to the Judge, who attends in Chambers on certain days for the purpose of hearing such cases, and he then deals with it, or he may adjourn it into Court to be there argued by counsel (*p*). This is the usual way of questioning a Master's decision in the Chancery Division, but, instead, notice of appeal to the Judge may be given, as in the case of a Master's decision in the Queen's Bench Division (*q*). Very many applications may equally be made by petition or summons, it being a point of discretion whether the matter is of sufficient importance for a petition. Ordinary instances in which a summons would always be used, would be applications for discovery and inspection, for better answers to interrogatories, or for leave to amend pleadings (*r*). Procedures on summons.
Instances of applications by summons.

Orders made on petitions or motions have to be drawn up in the same way as already pointed out as to a judgment (*s*), but, with regard to matters in Chambers, very often no orders are required to be drawn up, the Master's notes of what has been done being sufficient (*t*); and it is specially provided that orders made in Chambers to be acted on by the Pay- Drawing up of orders.

(*m*) Order LIV. r. 3.

(*n*) Ibid. r. 4. Summonses for time may, however, be made returnable for the next day. Ante, p. 93.

(*o*) It is the usual practice now to have summonses of a less important character—*e.g.*, summonses for time, heard before one of the junior officials in the Judge's Chamber.

(*p*) As to adjournment to the Judge, see ante, p. 214.

(*q*) Ante, pp. 127, 128.

(*r*) As to the practice on summonses in the Queen's Bench Division, see ante, pp. 92, 93.

(*s*) Ante, pp. 198, 199.

(*t*) Order LV. r. 73.

master-General, shall, unless otherwise directed, be drawn up by the Registrar, but every other order made in Chambers is, unless otherwise directed, to be drawn up by the Master (*u*). When orders made in Chambers require to be drawn up by the Registrar, he is furnished with the material for drawing up the order by the Master's indorsement on the back of the summons. Orders drawn up by the Master are signed by him, or a memorandum on the summons signed or initialled by the Master is sufficient (*v*).

Orders of
course.

For some things orders are granted as of course—*e.g.*, orders to tax solicitors' bills within the month (*w*). All such orders are now drawn up, passed, and entered, by or under the directions of the Registrars of the Chancery Division (*x*).

Evidence on
interlocutory
applications.

Upon all interlocutory applications the evidence is by affidavit, which need not be confined to such facts as the witness is able of his own knowledge to prove, as is the case with regard to affidavits at the hearing of the action, but statements as to the deponent's belief, with the grounds thereof, may be admitted (*y*), and secondary evidence of the contents of a document is also admitted (*yy*). The Court or a Judge may, on the application of any party to an action, order the attendance for cross-examination of any person making any affidavit (*z*), or a subpoena may be issued for his attendance before an examiner for cross-examination (*a*).

Interlocutory
accounts and
inquiries.

Although, as has been shown (*b*), all necessary

(*u*) Order LV. r. 74.

(*v*) Ibid. r. 74a.

(*w*) See ante, pp. 173, 179.

(*x*) Order LXII. r. 18.

(*y*) Order XXXVIII. r. 3. See ante, pp. 194–197 as to affidavits.

(*yy*) *Spencer v. Bailey*, 92 Law Times Newspaper, 213.

(*z*) Order XXXVIII. r. 1.

(*a*) Order XXXVII. r. 29.

(*b*) Aute, p. 198.

accounts and inquiries are usually directed to be taken and made by the judgment, yet for the sake of expedition, interlocutory accounts and inquiries may be ordered, for the Court or a Judge may at any stage of the proceeding direct any accounts and inquiries which appear necessary, to be made or taken, notwithstanding that it may appear that there is some special or further relief sought, or that there is some special issue to be tried, as to which it may be proper that the action should proceed in the ordinary way (*c*). In particular also Order XV. provides that in default of appearance to a writ of summons indorsed with a claim for an account, and after appearance unless the defendant, by affidavit, or otherwise, satisfy the Court or a Judge that there is some preliminary question to be tried, an order for the account claimed, with all directions usual in Chancery in similar cases, shall be made (*d*). Any application for such an order is made by summons, and must be supported by an affidavit filed on behalf of the plaintiff, stating concisely the grounds of his claim to the account, and if the defendant has not appeared there must be an affidavit of service and a certificate of no appearance. The application may be made at any time after the expiration of the defendant's time for appearing (*e*). To a certain extent a summons under Order XV. may be considered analogous to a summons under Order XIV. in the Queen's Bench Division (*f*), both having for their object the prevention of delay, and practically by means of a summons under Order XV. everything that would be granted at the hearing of the cause may often be obtained under it. Particularly where the account claimed is an executorship or administration account, the usual administration judgment will be made, and not merely an order for accounts (*g*). A

Summons
under Order
xv.

Object of such
a summons.

(*c*) Order xxxiii. r. 2.

(*d*) Order xv. r. 1.

(*e*) Ibid. r. 2.

(*f*) As to which see ante, p. 66.

(*g*) But the Master cannot make such an order; it must be made by

foreclosure order cannot, however be obtained under this provision (*h*).

Application for
appointment
of receiver.

An application that is often made to the Court is for the appointment of a receiver (*i*), it being provided that a receiver may be appointed in all cases in which it shall appear to the Court to be just or convenient that such appointment should be made (*k*). A receiver is some person appointed by the Court to receive the rents and profits of real or leasehold estate, or to get in and collect personal estate, or other things in question, pending the action, when it does not seem reasonable to the Court that either party should do so,

Security given
by receiver.

or when a party is incompetent to do so (*l*). Any person who is appointed receiver has to give security (*m*), which is usually a recognizance with two sureties conditioned in double the amount of the outstanding property he has to get in, or double the amount of the annual rent he has to receive, or it may be the receiver's recognizance together with the bond of a guarantee society (*mm*). The recognizance is given to the two senior Masters for the time being attached to the Chambers of the Judge to whom the cause or matter is assigned (*n*); and it has

To whom
recognizance
given.

the Judge in person (Order L.V. r. 15a.). It may be noticed that although chiefly used in the Chancery Division, Order xv. is also applicable to the Queen's Bench Division, so that notwithstanding s. 34 of the Judicature Act, 1873 (ante, p. 14), under which accounts are to taken in the Chancery Division, by force of this Order accounts may now be taken in the Queen's Bench Division (*York v. Stowers*, W. N. (1883) 174). No order, however, will be made in the Queen's Bench Division if the accounts are complicated, but the action will be transferred to the Chancery Division (*Leslie v. Clifford*, 50 L. T. 591).

(*i*) *Dyott v. Nevill*, W. N. (1887) 75.

(*j*) As to application for the appointment of a receiver by way of equitable execution, see ante, pp. 158-160.

(*k*) Jud. Act, 1873, s. 25 (8).

(*l*) Daniel's Ch. Fr. 6th ed. 1664.

(*m*) Order L. r. 6.

(*mm*) An affidavit is required to be made by an officer of the society, stating when the society was registered, its subscribed capital, the amount and nature of its investments, that the claims against the society do not exceed a certain amount, and that no winding-up proceedings are pending.

(*n*) Order L.X. r. 4.

to be executed before a Commissioner to administer oaths. The ordinary practice to obtain the appointment of a receiver is to apply to the Court by motion (*o*), but the appointment may, by consent in a suit commenced by originating summons, and in certain special cases, be made on summons in Chambers—*e.g.*, where a vacancy occurs by death, or otherwise, of a receiver already appointed (*p*). The application is supported by affidavit of the fitness of the person proposed to be appointed, and the recognizance is afterwards approved in Chambers. The duties of a receiver are to act strictly according to what he is appointed for—*e.g.*, to get in any outstanding estate he is directed to, or to collect rents. He has no power to make leases without an order of the Court, but he can distrain for rent within the year. For any special matter application must be made by summons in Chambers for directions and sanction. The receiver must from time to time, as directed by the order appointing him, carry into Chambers and pass his accounts, which are verified by his affidavit and subsequently vouched. Should he make default in bringing in his account, a summons may be taken out to enforce it. The Master makes his certificate on each account, and the balance appearing thereon to be in the receiver's hands is then usually paid into Court (*q*). When a receiver's duties are ended, the recognizance entered into on his appointment should be directed to be vacated, and the proper officer then, on due notice, attends one of the Masters to whom the recognizance was given, who thereupon vacates it in the usual manner (*r*).

Mode of
applying.

Duties and
powers of
receiver.

Receiver's
accounts.

Vacating
recognizance.

Beyond the appointment of a receiver, an order may be made for the preservation, or interim custody, or inspection, of any property the subject of a pending action, or for it to be brought into Court or otherwise

Preservation
of property.

(*o*) Order L. r. 6.

(*q*) Order L. rr. 19-22.

(*p*) *Booth v. Caulton*, 16 W. R. 663.

(*r*) Order Lx. r. 4.

secured; and if any property is of a perishable nature, or if for other reasons it appears desirable, an order may be made for its sale (*s*). It is also provided that where by any contract a *prima facie* case of liability is established, and there is alleged as matter of defence a right to be relieved wholly or partially from such liability, the Court or a Judge may make an order for the preservation, or the interim custody, of the subject-matter of the litigation, or may order that the amount in dispute be brought into Court or otherwise secured (*t*).

Injunction.

The Court has also, for the purpose of the preservation of property, and for other purposes, a very wide power of granting injunctions, and this may be the direct object of the action, or it may be merely an interlocutory and ancillary application. Both cases may, however, be dealt with in this place. This power of granting an injunction was always possessed by the Court of Chancery, and by the Common Law Procedure Act, 1854 (*u*), a like power was given in certain cases to the Courts of Common Law. Now under the Judicature Act, 1873 (*v*), very wide powers of granting injunctions are given, it being provided that an injunction may be granted whenever just or convenient (*w*), and that if an injunction is asked either before, or at, or after the hearing of any cause or matter to prevent any threatened or apprehended waste or trespass, such injunction may be granted if the Court shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or, if out of possession, does or does not claim a right to do the act sought to be restrained under any colour of title, and whether the estate claimed by both or either of the

Extension of power of granting injunctions by Judicature Act, 1873.

(*s*) Order L. rr. 2, 3. This equally applies to an action in the Queen's Bench Division. Thus, in an action concerning a horse, an order was made for its sale. (*Bartholomew v. Freeman*, 3 C. P. D. 316, 38 L. T. 814).

(*t*) Order L. r. 1.

(*u*) 17 & 18 Vict. c. 125, s. 79.

(*v*) 36 & 37 Vict. c. 66, s. 25 (8).

(*w*) See hereon Indermaur's Manual of Equity, 3rd ed. 378, 379.

parties is legal or equitable. An injunction may be granted as well after as before judgment in the action (*x*), and besides prohibiting an act it may command one to be done, in which case it is called a mandatory injunction. Thus in an action by a mortgagee for an injunction to restrain his mortgagor from removing fixtures, besides prohibiting the removal, the injunction might also extend to the restoration of any already removed. Mandatory injunction.

No writ of injunction is now issued. An injunction is granted by a judgment or order, and any such judgment or order has the same effect that a writ of injunction previously had (*y*). The proper course to enforce an injunction is to serve a copy of the order granting it personally on the party, and if it is disobeyed the party is liable to attachment (*z*); but notwithstanding the order has not been served, if the injunction is brought to the party's knowledge, he is liable if he wilfully acts in opposition to it, and this is so even if he were not a party to the action (*zz*). An injunction, or indeed any judgment or order, against a corporation wilfully disobeyed, may by leave of the Court or a Judge be enforced by sequestration against the corporate property, or by attachment against the directors or other officers thereof, or by writ of sequestration against their property (*a*). No writ of injunction.
Enforcing injunction.

In matters of a pressing nature a plaintiff may obtain an interlocutory injunction *ex parte* (*b*), but he must make out a strong case. The writ of summons in the action must be issued, though it need not be first served, and the course to take to obtain an *ex parte* injunction is to move the Court on an affidavit shewing the circumstances and the urgency of the case. The Court in granting an *ex parte*, or, indeed, Ex parte injunction.

Usual undertaking as to damages.

(*x*) Order L. r. 12.

(*y*) Ibid. r. 11.

(*z*) Order XLII. r. 7.

(*zz*) *Seaward v. Paterson*, Weekly Notes (1897) 14; Law Students' Journal, March 1897, p. 50; see also, post, p. 246.

(*a*) Ibid. r. 31.

(*b*) Order LII. r. 3.

Enforcing
undertaking.

any interlocutory injunction, puts the plaintiff under terms to abide by any order the Court may thereafter make as to damages, if it shall appear that the injunction ought not to have been granted (*c*). This is called the "usual undertaking as to damages," and if the order for an injunction is not afterwards maintained, the Court may direct an inquiry as to the damage sustained by reason of it, and order payment thereof, and this even although the plaintiff was not guilty of any misrepresentation, suppression, or other default in obtaining the injunction (*d*). An application to enforce the undertaking ought to be made either when the injunction is dissolved before the trial, or when judgment is given at the trial of the action, and not later, except under special circumstances, and the Court may refuse an inquiry if the damage sustained is trivial or remote (*e*).

Expediting
trial in certain
cases.

On any motion for an injunction, or, indeed, on an application for any order before trial, if it appears to the Judge that the matter is one that can most conveniently be dealt with by an early trial without going into the whole merits on the interlocutory application, the Judge may make an order for such trial accordingly, and may direct such trial to be held at the next assizes for any place, if from local or other circumstances it shall appear to him to be convenient so to do, and in the meantime may make such order as the justice of the case may require (*f*).

Payment into
Court.

Applications for payment into Court are almost invariably made when a party has in his hands certain moneys, the subject of the action. For instance, if an executor or administrator in any pleading or affidavit,

(*c*) *Graham v. Campbell*, 7 Ch. D. 490; 47 L. J. Ch. 593; 26 W. R. 336. See further as to Injunctions, Daniel's Ch. Pr. 6th ed. 1574-1627.

(*d*) *Griffith v. Blake*, 27 Ch. D. 474; 53 L. J. Ch. 965; 51 L. T. 274.

(*e*) *Smith v. Day*, 21 Ch. D. 421; 48 L. T. 54.

(*f*) Order L. r. 1a.

or even verbally (*ff*), admits that he has a certain sum in hand on account of the estate, the proper course usually is to at once take out a summons, on which an order is made for payment of such sum into Court. Every order which directs funds to be lodged in Court, must have annexed thereto a schedule, styled a lodg-^{Lodgment schedule.}ment schedule, which is in a certain printed form, and headed with the title of the cause, the date of the order, and the title of the ledger credit to which the funds are to be placed, and it sets out in a tabular form the name or a sufficiently identifying description of the person by whom the funds are to be lodged, and the amount, if ascertained, and the description of the funds (*g*). The payment into Court is effected by^{Mode of payment in.} leaving a copy of the lodgment schedule at the Chancery Pay Office, where formal directions are given to the Bank of England to receive the money in accordance with the order (*h*). The directions are then taken to the Bank, and the money is paid in and notice thereof duly given to the other parties to the action, and the amount is duly carried to the credit of the action, or the credit of any particular account directed by the order, in the books of the Paymaster-General, and a certificate of the lodgment having been made is filed by the Paymaster, and an office copy of such certificate is received as evidence of the lodgment (*i*). If the order does not direct an investment^{Investment.} of the money, it is, unless a request is made that it should not be, placed on deposit at the Bank (*j*), when it bears interest at 2 per cent. per annum.

Money may also in certain cases be brought into Court voluntarily without any order, upon the written^{Payment into Court without order.} request of the person so desirous of paying it into Court. Upon such request the Paymaster gives a direc-

(*ff*) *Re Beeny, Ffrench v. Sproston* (1894), 1 Ch. 499; 63 L. J. Ch. 312; 70 L. T. 160.

(*g*) Supreme Court Funds Rules, 1894, r. 5.

(*h*) *Ibid.* r. 30.

(*i*) *Ibid.* rr. 29, 38.

(*j*) *Ibid.* r. 76.

Payment into
a suspense
account.

tion for the money to be received by the Bank of England, but such a payment in on a request only, cannot be made to a separate account, but simply to the credit of the cause (*k*). When it is desired to bring money into Court without waiting the time necessary to obtain a direction to the Bank to receive the money, it may forthwith be lodged at the Bank to the credit of a Supreme Court Suspense Account, upon an application signed by the person desiring to so lodge it or his solicitor, specifying the amount and the title of the ledger credit to which it is desired to be lodged, and a certificate of such lodgment is then given, but the party so paying in must subsequently obtain the proper direction (*l*).

Certificate of
fund or
transcript of
account.

If in the course of an action evidence is required by any party to it, of what money is in Court, a certificate of fund may be obtained from the Paymaster-General's Office on payment of a fee-stamp of 1s. A complete transcript of the account, showing the dealings with the funds from time to time, may also be obtained on leaving a proper book for the same to be copied into, and certain fee stamps (*m*).

Deposit of
securities or
other chattels
in Court.

Not only may money be paid, and stocks transferred, into Court, but any securities or effects may be ordered to be brought into Court, in which case they must be deposited in locked boxes, or in such other secure manner as shall satisfy the Bank of England; and before taking the custody thereof, the officer acting on behalf of the Bank may at his discretion require an inspection of its contents in the presence of the person making the deposit (*mm*).

Investment of
cash in Court.

Cash under the control of, or subject to, the order of

(*k*) Supreme Court Funds Rules, 1894, r. 30. As to payment of money out of Court, see *post*, pp. 246-249.

(*l*) *Ibid.* r. 31.

(*m*) *Ibid.* rr. 99, 100.

(*mm*) *Ibid.* r. 29.

the Court, may be invested in the following stocks, funds, or securities :—viz., Two and Three-Quarters per Cent. Consolidated Stock (to be called after the 5th of April 1903, Two and a Half per Cent. Consolidated Stock); Consolidated Three Pounds per Cent. Annuities; Reduced Three Pounds per Cent. Annuities; Two Pounds Fifteen Shillings per Cent. Annuities; Two Pounds Ten Shillings per Cent. Annuities; Local Loans Stock under the National Debt and Local Loans Act, 1887; Exchequer Bills; Bank Stock; India Three and a Half per Cent. Stock; India Three per Cent. Stock; Indian Guaranteed Railway Stock, Shares, or Annuities; Stocks of Colonial Governments guaranteed by the Imperial Government, provided that in each case such stock, shares or annuities shall not be liable to be redeemed within a period of fifteen years from the date of investment; Mortgage of freehold and copyhold estates respectively in England and Wales; Metropolitan Consolidated Stock, Three Pounds Ten Shillings per Cent.; Three per Cent. Metropolitan Consolidated Stock, provided that in each case such stock shall not be liable to be redeemed within a period of fifteen years from the date of investment; Debenture, Preference, Guaranteed, or Rent-charge Stocks of Railways in Great Britain or Ireland having for ten years next before the date of investment paid a dividend on Ordinary Stock or Shares; Registered Stocks or Registered Bonds issued under the Local Loans Act, 1875, provided in each case that such stocks or bonds shall not be liable to be redeemed within a period of fifteen years from the date of investment (n).

If in any action brought to recover certain property the defendant sets up a lien thereon for a certain sum of money, the plaintiff may at once take out a summons to be at liberty to pay into Court, to abide the result of the action, the amount of such lien, and any further

Application where defendant sets up a lien on property.

sum that may be directed for interest or costs, and that upon such payment in, the property may be given up to him (o).

Ne exeat regno. An application is sometimes made for a writ of *ne exeat regno*. This is a writ which issues to restrain a person from going out of the kingdom without the license of the Sovereign, or of the Court (p). It was formerly, in general, issued only where the claim was of an equitable nature—*e.g.*, to prevent a trustee from going abroad. To take this instance, if a *cestui que trust* had reason to believe that his trustee, who had not accounted to him, was going abroad without accounting, he might issue a writ against him for an account, and then immediately apply to the Court *ex parte*, by motion, for this writ, which would be granted on due cause shewn by affidavits (q). It has, however, been held (r) that since the Judicature Acts, 1873 and 1875, the practice at Common Law and in Equity in respect of the arrest of a debtor on mesne process is assimilated, and that a writ of *ne exeat regno* in respect of an equitable debt will not be granted unless the applicant brings his case within the terms of the 6th section of the Debtor's Act, 1869, a subject which has been already dealt with (s).

Important
limitation of
extent of writ
of *ne exeat
regno*.

Stop order.

In the course of an action in this Division, money is frequently paid into Court to be dealt with by the Court in the action, and when persons have successive interests in it—*e.g.*, if the income of the fund is given to one for life, and then the *corpus* to some other person or persons—it usually remains in Court until the happening of this ultimate event. In such cases

(o) Order L. r. 8. *Gibbs v. Lamport*, 16 Q. B. D. 735; 55 L. J. Q. B. 239; 54 L. T. 663; *Gebruder Naf v. Ptoon*, 25 Q. B. D. 13; 59 L. J. Q. B. 371; 63 L. T. 328.

(p) Daniel's Ch. Pr. 6th ed. 1648.

(q) Daniel's Ch. Pr. 6th ed. 1648-1651.

(r) *Drover v. Beyer*, 13 Ch. D. 242; 49 L. J. (Ch.) 37.

(s) Ante, p. 115.

it often happens that a beneficiary charges or disposes of his interest to some person, and, if so, to perfect the charge or disposition in his favour, such person should obtain a stop order. This is an order preventing any fund in Court being paid out, or otherwise dealt with, without notice to the applicant. The application for it is made by summons in Chambers (*t*), except where the fund, exceeding £1000, has been paid into Court under the Trustee Act, 1893, and there has been no prior application in the matter of that fund, in which case a petition is necessary (*u*). The application must be supported by evidence shewing the interest of the party against whom the stop order is sought, in the fund in Court, and verifying the security or interest that has been acquired by the applicant. The summons or petition, as the case may be, need not be served upon all parties to the cause or matter, but only on the persons whose interests are affected. The applicant for any such order is liable at the discretion of the Court or a Judge to pay any costs, charges, or expenses which, by reason of the obtaining of any such order, shall be occasioned to any party to the cause or matter, or any persons interested in the fund (*v*).

What it is.

How obtained.

If a plaintiff does not proceed with due diligence in prosecuting the accounts and inquiries in Chambers, or generally in bringing the action to a conclusion, the Court or Judge may require the party having the conduct of the proceedings, or any other party, to explain the delay, and may thereupon make such order with regard to expediting the proceedings, or the conduct or stay thereof, and as to the costs of the proceedings, as the circumstances of the case may require; and for the purposes aforesaid any party, or

Delay in prosecuting accounts and inquiries.

(*t*) *Walsh v. Mason*, 22 W. R. 676.

(*u*) *Re Teogood*, 56 L. T. 703.

(*v*) Order XLVI. rr. 12, 13; Daniel's Ch. Pr. 6th ed. 1633-1637. As to a Distringas, see post, p. 276. As to a Charging Order, see ante, p. 164.

Summons for
conduct of
cause.

the official solicitor of the Court, may be directed to summon the persons whose attendance is required, and to conduct any proceedings and carry out any directions which may be given; and any costs of the official solicitor are to be paid by such parties, or out of such funds as the Court or Judge shall direct; and if any such costs be not otherwise paid, the same are to be paid out of such moneys (if any) as may be provided by Parliament (*w*). An application with regard to delay usually takes the form of a summons by some party, that the conduct of the cause may be given to him (*x*), but the Judge may take spontaneous action, and in particular hereon it should be noticed that it is provided that each Master shall, at the beginning of every sittings, report to the Judge to whose chambers he is attached, all the cases in which he considers that there has been any undue delay in the proceedings before him (*y*).

Search to
ascertain state
of proceedings.

For the purpose of enabling all persons interested to obtain precise information as to the state of any cause or matter, and to take any steps for preventing improper delay in the progress thereof, the proper officer must, at the request of any person, whether a party or not to the cause or matter inquired after, but on payment of the usual fee, give a certificate specifying therein the dates and general description of the several proceedings which have been taken in such cause or matter (*z*).

Course to be
taken when
two actions
commenced for
administration
of any estate,
and judgment
first obtained
in second
action.

If an action is instituted for the administration of an estate, and the writ served upon the defendant, the personal representative, and subsequently a like action is commenced by another person interested in the estate, it is evident that the defendant can often by

(*w*) Order xxxiii. r. 9.

(*x*) Daniel's Ch. Pr. 6th ed. 1003, 1004.

(*y*) Order xxxiii. r. 8b.

(*z*) Order lxii. r. 24.

delaying the first plaintiff and assisting the second one, enable the latter to obtain judgment first. In such a case the proper course is for the plaintiff in the first action, on discovering the judgment in the second action, to take out a summons entitled in the two actions, asking that he may have liberty to attend the proceedings under the judgment in the second action, that he may have the conduct of such proceedings given to him, and that the costs of his action may be the costs in the second action, and such an order will usually be made. Should it happen that the actions are assigned to different Judges, then, before taking out the summons, the plaintiff in the first action must get it transferred to the Judge to whom the other action is assigned (*a*).

If any person who is a ward of Court is desirous of contracting marriage, an application for leave to marry must be made. The application is made by petition, by the intended husband, stating (1) the age of the ward; (2) the nature and amount of his or her fortune; and (3) the contemplated marriage, and the age, rank, position, and fortune of the person to whom the infant is proposed to be married, and praying for an inquiry whether the marriage is a proper one. The order made on the petition refers the matter to Chambers, where—the Master being first satisfied of the fitness of the match—the settlements are considered, settled, and approved, and an order is ultimately made that on the execution of the settlements the parties be at liberty to marry (*b*).

In some cases a direction is given by the Court for something to be done or carried out in Chambers, and for such matters it is not always necessary to draw up

Application for
leave for ward
of Court to
marry.

Direction for
matters to be
done in
Chambers.

(*a*) *Rhodes v. Barrett, Ex parte Singleton*, L. R. 12 Eq. 479; 41 L. J. Ch. 103.

(*b*) *Daniel's Ch. Pr.*, 6th ed. 1134, 1135. As to an application under 18 & 19 Vict. c. 43, see post, pp. 272, 273.

Settling
deed if parties
differ.

an order, but a note of the direction may be obtained from the Registrar, and the matter proceeded with upon that (c); thus, a direction may be given by the Court for the settlement of a deed in Chambers in case the parties differ as to it. Where such a direction is given, the mode of procedure is to issue a summons to proceed, and upon the return thereof the party entitled to prepare the draft deed is directed to deliver a copy thereof, within such time as the Judge shall think fit, to the party entitled to object thereto, and the party so entitled to object is directed to deliver to the other party a statement in writing of his objections (if any), within eight days after the delivery of such copy, and the proceedings are then adjourned until after the expiration of such period of eight days (d). The deed is then considered and settled by the Judge in Chambers (e).

Application for
payment of
income of real
or personal
estate, or part
of corpus of
personalestate.

When any real or personal estate forms the subject of any proceedings in the Chancery Division, and the Judge is satisfied that the same will be more than sufficient to answer all the claims therein which ought to be provided for in such proceedings, the Judge may at any time after the commencement of the proceedings allow to the parties interested therein, or any one or more of them, the whole or part of the annual income of the real estate, or a part of the personal estate, or the whole or part of the income thereof up to such time as the Judge shall direct (f). Under this provision an order for maintenance can in many cases be obtained at a very early stage of the proceedings, instead of waiting, as was formerly necessary, till the matter had been before the Chief Clerk, and he had certi-

When an order
for main-
tenance can be
obtained.

(c) Order LV. r. 29.

(d) Ibid. r. 34.

(e) As to appeal from deed settled by Judge, see *Pollock v. Rabbits*, 21 Ch. D. 466. Though a Master has jurisdiction to so act as the Judge's Deputy, a District Registrar has not, unless so ordered by the Judge, *Hodgetts v. Baker*, 34 Sol. Jl. 584.

(f) Order L. r. 9.

fied that there was a clear balance applicable to that purpose. An application for an order for maintenance How obtained. when an action is pending (*g*) is made by an ordinary summons, supported by the proper evidence (*h*), and a scheme showing the heads of the intended expenditure should also be brought into Chambers. If an increase of the allowance is afterwards required, the application for it is also made by an ordinary summons supported by an affidavit showing the necessity for the increase. Where money is thus paid by order of the Court for maintenance, the Court always considers that it is paid No account required from guardian. to the dispensing hand, coupled with an obligation only to perform the conditions, and, provided the infant is properly maintained, the Court requires no account of what (if any) surplus remains (*i*).

(*g*) As to an originating summons for guardianship and maintenance see post, p. 272.

(*h*) See post, p. 272.

(*i*) *Jodrell v. Jodrell*, 14 Beav. 411.

CHAPTER IV.

• PROCEEDINGS TO CONCLUSION.

IN Chapter II. of this Part the proceedings in Chambers under the judgment were considered down to their conclusion—viz., the Master's certificate(*a*). We have now to deal with the proceedings subsequent to this to their close.

Further
consideration
always
reserved.

Every judgment directing accounts and inquiries to be taken and made, always reserves the further consideration of the action; for it is evident that after the accounts and inquiries have been proceeded upon before the Master in Chambers, and he has made his certificate, the cause must again come before the Court to be finally disposed of, for the certificate only certifies a number of facts, and it is for the Court subsequently to act on these facts as found by the Master. This being so, it is manifestly of great importance that the Master should have accurately certified the facts; and that this should be so to the fullest extent, there exists the power of taking the opinion of the Judge on any point as it arises, or of applying to vary the certificate, as has been already mentioned (*b*).

Causes set down
on further
consideration.

The step to bring the action to a conclusion, is to set it down for final hearing, or, as it is called, for hearing on further consideration. The action cannot be thus set down until the expiration of eight days from the filing of the Master's certificate, unless this

Time for
doing so.

(*a*) Ante, pp. 203-221.

(*b*) Ante, p. 215.

time is waived by the other side. If it is not set down by the plaintiff, or other party having the conduct of the proceedings, within fourteen days from the filing of the Master's certificate, it may be set down by any other party. The mode of setting it down is to hand in to the Registrar's Clerk a written request signed by the solicitor setting it down, asking that it may be set down, and to produce to him the office copy of the judgment or order which adjourned the further consideration, and also an office copy of the Master's certificate, or a memorandum of the date when the certificate was filed indorsed on the request by the proper officer. The cause is then set down, but is not allowed to be put in the paper for hearing until after the expiration of ten days from the day on which it was set down; and notice of its having been set down must be given to the other parties at least six days before the day for which the same is marked for hearing (c), and if any persons have been served with notice of the judgment (d), and have appeared, they must be served with like notice (e). The practice is in general the same as on the original hearing, both as to the hearing itself and the subsequent drawing up of the order or judgment (f), but no further evidence than the certificate will be received except by special leave of the Court, and the Court will draw conclusions from statements in the certificate (g). The party who has set the cause down must leave in Court with the Judge's secretary for the use of the Judge, a copy of the judgment or order which adjourned the further consideration, and also of the Master's certificate; and if minutes of the proposed order on further consideration have been prepared, two copies thereof must also be left.

How set down.

Time to elapse before it can come on.

Notice of setting down

Practice on hearing.

In certain cases the further consideration may be

Further consideration in Chambers.

(c) Order xxxvi. r. 21.

(d) See ante, pp. 204, 205.

(e) Daniel's Ch. Pr. 6th ed. 1156, 1159. (f) Ante, pp. 198, 199.

(g) *May v. Newton*, 34 Ch. D. 347; 56 L. J. Ch. 313; 56 L. T. 140.

heard in Chambers—viz., where the order to be made is for the distribution of an insolvent estate (*h*), or for the distribution of the estate of an intestate, or for the distribution of a fund amongst creditors or debenture-holders (*i*); or where the matter originated in Chambers and was adjourned for further consideration in Chambers (*j*). Where questions of difficulty however arise, the further consideration may in any of these cases be in Court (*k*).

Judgment on further consideration.

When cause cannot at once be finally disposed of.

Where some persons entitled cannot yet be ascertained.

The Court will, when possible, give a final judgment on the hearing on further consideration, declaring the rights of the parties, dealing with the whole property the subject of the action, and directing the taxation and payment of costs. In some cases, however, to at once finally dispose of the whole action is impossible, for there may be further matters necessary to be inquired into, and when this is so the action will be disposed of only as far as it can be up to that time. Any further accounts and inquiries that appear necessary or advisable will then be directed, and as to them the cause will stand in the same position as originally; that is to say, these further accounts and inquiries will have to be proceeded with in Chambers, a further certificate of the Master obtained, and there will be then another hearing on further consideration. It is also now specially provided that where some of the persons entitled to a distributive share of a fund are ascertained, and difficulty or delay has occurred or is likely to occur in ascertaining the persons entitled to the other shares, the Court or a Judge may order or allow immediate payment of their shares to the persons ascertained, without reserving any part of those shares to answer the costs of ascertaining the persons entitled

(*h*) As to the administration of insolvent estates in Bankruptcy under s. 125 of the Bankruptcy Act, 1887 (46 & 47 Vict. c. 52), see Indermaur's "Manual of Equity," 3rd edition, 111-113.

(*i*) Order LV. r. 2 (16).

(*j*) Ibid. r. 72.

(*k*) Re Barber, *Burgess v. Vinnicombe*, 31 Ch. D. 665; 55 L. J. Ch. 373.

to the other shares, and in all such cases such order may be made for ascertaining, and payment of, the costs incurred down to and including such payment, as the Court or Judge shall think reasonable (*l*).

And even although the action may not require any further accounts and inquiries, or any further actual hearing, yet in many cases it is necessary that the Court should retain control over persons and property—*e.g.*, where there are infants, or where there is a fund in Court on which the dividends have to be paid to certain persons, and ultimately the *corpus* to others. In all such cases as this, the judgment on further consideration reserves liberty to apply, so that on any point that may be necessary the parties may from time to time apply to the Court in the existing action.

Parties and property remaining under control of the Court.

Liberty to apply.

The next thing to observe is the enforcement and carrying out of the judgment. The order on further consideration in some cases may direct money to be paid by one of the parties, and the different modes of enforcing such a judgment as this have already been pointed out (*m*); in other cases it may direct some act to be done by one of the parties other than payment of money, and here again the modes of proceeding have been pointed out (*n*), but the process of attachment for contempt of Court is of more constant occurrence in this than in the Queen's Bench Division and should therefore be here specially noticed.

Enforcement and carrying out of judgment.

An application for an attachment is made to the Court by motion, of which notice has been duly served, stating in general terms the grounds of the application, and if such motion is founded on evidence by affidavit—as is practically always the case—a copy of any affidavit intended to be used must be served with the notice of

Attachment for contempt of Court.

(*l*) Order LVI. r. 14c.

(*m*) Ante, pp. 154–168.

(*n*) Ante, pp. 165, 166.

Evidence in support of motion to attach.

Writ of attachment.

Purging contempt.

Dealing with money in Court.

Payment schedule.

motion (o). Personal service of such notice is not necessary; it is sufficient if it is served in the way ordinary notices and proceedings in an action are served (oo). In support of the motion it must be shewn that the judgment or order directing the doing or not doing of the act in respect of which the attachment is sought, was served upon the person, or in some way brought to his knowledge, and that there has been a wilful breach of it (p). Upon this contempt being shown an order will be made for a writ of attachment to issue, under which the party will be imprisoned either for a fixed period or otherwise. If no period of imprisonment is stated, how long the party remains in prison is a matter of discretion with the Court, but he is usually after a reasonable time has elapsed allowed to clear his contempt by doing, or undertaking to do, or not to do, the act in question, as the case may be, and paying the costs incurred by his disobedience. This is called purging or clearing his contempt.

In some cases there may be money in Court which is dealt with by the judgment or order on further consideration, either by being directed to be paid or transferred to a party, or carried over to a certain credit. Every order which directs fund in Court to be paid, sold, transferred or delivered to any person or carried over to any other credit must have annexed thereto a payment schedule in a certain printed form, headed with the title of the cause or matter, the date of the order, the ledger credit to which the funds dealt with are standing, and a statement of the funds to be dealt with, and it must set out in a tabular form, the name of the person to whom the payment or transfer is to be made, unless the name is stated in a certificate of a

(o) Order LII. r. 4. *Hampden v. Wallis*, 26 Ch. D. 746; 54 L. J. Ch. 83; 32 W. R. 808.

(oo) *Browning v. Sabin*, 5 Ch. Div. 511; 46 L. J. Ch. 728; In re *A Solicitor*, 14 Ch. D. 152; 49 L. J. Ch. 295.

(p) *Fairclough v. Manchester Ship Canal Co.*, Weekly Notes (1897) 7; Law Students' Journal, March 1897, p. 50. See also ante, p. 231.

Master in the Judge's Chambers or a Taxing Master, or unless payment is directed to be made to trustees or other persons in succession, or to representatives when no probate or letters of administration have then been taken out; the title of the ledger credit to which any funds are to be carried over; the amount and description of the fund being dealt with; and the nature and necessary particulars of any other dealings with such funds by the Paymaster (*q*). The instructions to the Paymaster are solely contained in this schedule (*r*). Any necessary calculations of residues of money in Court dealt with by an order are made in the Pay Office (*s*), and where any evidence is required on any point by the Paymaster he may act on an affidavit or statutory declaration (*t*). When cash in Court is directed to be paid out, a cheque is obtained by simply leaving the payment schedule at the Pay Office and bespeaking it, and it will be usually ready after the lapse of two or three days. The party to receive the money then attends with his solicitor (who must previously have been identified at the Chancery Pay Office), who identifies him as the person named in the judgment or order, and he receives his cheque, or he may give a power of attorney to some person to receive the money (*u*). Where stock is to be transferred or sold this is also done by leaving the schedule containing the direction at the Pay Office and the transfer or sale is then effected, and in this latter case a cheque is obtained as above detailed (*v*).

Calculations
of residues.

Identification
on receiving
money out of
Court.

Transfer or
sale.

To a certain extent persons entitled to receive money out of Court under an order, may obtain payment thereof through the post, distinctions in the practice existing according to the amount. *Firstly*, any amount up to

Payments
through the
post.

1. Up to £1000.

(*q*) Supreme Court Funds Rules, 1894, rr. 6, 11.

(*r*) Ibid. r. 10.

(*s*) Ibid. r. 94.

(*t*) Ibid. r. 96.

(*u*) The power of attorney has to be prepared in the Pay Office. A power of attorney can only be bespoken by a solicitor practising in London, a London banker, or the grantor personally.

(*v*) Supreme Court Funds Rules, 1894, rr. 44-47, 49.

£1000 may be so obtained provided the person has an account at a bank in the United Kingdom, and provided his name and address are stated in the order directing payment, or are certified by the solicitor having the conduct of the order. In this case the Paymaster's direction for payment is made payable to the order of such person, and specially crossed to his account at the Bank named in the request for payment, and is also

2. Up to £500. made not negotiable. *Secondly*, as to amounts up to £500 payable to any person not having an account at a bank, or whose address is not ascertained as above stated, the Paymaster remits by post on a request signed by such person, and attested by a Justice of the Peace, or a Commissioner to administer oaths, or a clerk in holy orders, or a notary public. The Paymaster's direction is in this case sent to the address stated in the request and is crossed generally. *Thirdly*, if the amount payable does not exceed £10, and the name and address of the party are on the order, or are certified by the solicitor having the conduct of the cause, then payment may be made through the post on a simple request without attestation, the direction for payment being crossed generally. *Fourthly*, as to any dividend, annuity, or other periodical payment (to which none of the above provisions apply), the same may from time to time be sent by post to the party entitled, on his request attested as stated in the secondly above-mentioned case, the direction for payment being crossed generally. In this case evidence must from time to time, however, be furnished to the Paymaster of the continuance of the life (x), and with regard to any payments depending on the continuance of life, or on the fulfilment of any conditions, the proper evidence to satisfy the Paymaster is a declaration signed by a solicitor acting on behalf of the person entitled, or a declaration by such person, attested in the same manner as has been mentioned with regard to a request for payment through the post (y).
3. Up to £10.
4. Periodical payments.

Evidence of
continuance of
life, &c.

(x) Supreme Court Funds Rules, 1894, r. 43.

(y) Ibid. r. 95.

Where an order directs any funds in Court to be paid or transferred to a person who dies before receiving the same, payment or transfer is made to his personal representatives on proof of his death, except where the order states the deceased person to have been entitled to the funds as real estate, or as trustee, executor, or administrator, or otherwise than in his own right and for his own use; if no administration has been taken out to such deceased person, and his total assets do not exceed £100, payment or transfer may be made to the person who, being widow, child, father, mother, brother, or sister of the deceased, would be entitled to take out administration to his estate, upon such person making a declaration in a prescribed form (*z*). When payment or transfer is directed to be made to any persons as the legal personal representatives, and one or more of them dies, on proof of such death, payment or transfer may be made to the survivors or survivor (*a*). The foregoing provisions, however, do not apply where probate or letters of administration have only been granted at a time subsequent to the expiration of six years from the date of the order directing payment or transfer (*b*). If a woman marries after an order for payment or transfer to her, such payment or transfer is nevertheless made to her, upon production of an affidavit by her and her husband of no settlement or agreement for a settlement, or where there is a settlement or agreement for one, on production of the like affidavit identifying it, and stating there is no other, and of an affidavit by the solicitor of the husband and wife that he has carefully perused the settlement or agreement for a settlement, and that it does not affect the question (*c*).

Death of party
after order for
payment.

Marriage of
woman after
order for
payment.

We have said that the judgment or order on further consideration usually deals with the question of costs.

(*z*) Supreme Court Funds Rules, 1894, r. 62.

(*a*) Ibid. r. 64.

(*b*) Ibid. r. 65.

(*c*) Ibid. r. 61.

Sometimes by it the costs are directed to be paid by one of the parties, but in a very great number of cases they are ordered to be paid out of some fund in Court. The general subject of costs has already been considered (*d*), and it is not therefore necessary to add much here, but the student should be reminded that as there is not any issue tried by a jury in this Division, it is generally necessary for the Court to give a direction as to costs, and costs are in the discretion of the Court (*e*).

Procedure
where costs
ordered to be
taxed, in case
the parties
differ.

Sometimes an order directs costs to be paid by one party to another, the same to be taxed in case the parties differ. When the order is to this effect, the strictly proper course is for the party claiming the costs to bring his bill into the Taxing Office and give notice thereof to the other party, and at any time within eight days after such notice the other party has liberty to inspect the same without payment of any fee. At any time before the expiration of the eight days, or such further time as the Taxing Master shall in his discretion allow, such other party must either agree to pay the costs or signify his dissent therefrom, and is thereupon at liberty to tender a sum of money for the costs; but where he makes no such tender, or where the party claiming such costs refuses to accept the sum so tendered, the Taxing Officer proceeds to tax the costs, and where the taxed costs do not exceed the sum tendered, the costs of the taxation are borne by the party claiming the costs(*f*).

Taxation.

The proceedings to tax costs in this Division are of a more formal and, usually, more lengthy character than in the Queen's Bench Division (*g*), on account of

(*d*) Ante, Part II. chap. v. pp. 171-181. As to the provisions with regard to costs on claims, and as regards particular shares (Order LXV. rr. 14a, 14b, see ante, p. 211.

(*e*) Order LXV. r. 1, ante, p. 171.

(*f*) Ibid. r. 27 (34).

(*g*) As to which see ante, p. 176.

the different class of cases involved—a reason which indeed accounts for nearly all difference in practice in the two Divisions—for, as a Chancery action generally necessarily lasts much longer than one in the Queen's Bench Division, and naturally the bills of costs therefore are usually much heavier, it is impossible that they can be disposed of in the same summary way as they can be there.

The proceedings to taxation in the Chancery Division are as follows: The solicitor having the carriage of the order certifies on the office copy of the judgment or order directing taxation, that the cause or matter has not already been referred to any Taxing Master, and leaves it with one of the Taxing Masters, who is called the Sitting Master of the day. He refers it to one of the Taxing Masters for taxation in proper rotation (*h*), and in any future taxation of costs in the same action no fresh reference is necessary, but it will take place before the same Master. The solicitor then (within seven days from the date of entry of the judgment or order) leaves a copy thereof with the Taxing Master to whom the taxation has been referred, together with a statement of the names and addresses of the different solicitors or of the parties appearing in person, and also of the nature of the different parties' interests, and if he fails to do this no costs of drawing and copying the bill, nor of attending the taxation, are allowed him. The Taxing Master then gives an appointment to proceed with the taxation and notifies by what date the bills and papers are to be lodged with him. In every bill of costs the professional charges have now to be entered in a separate column from the disbursements, and every column should be cast before the bill is left for taxation. An appointment to tax is then given, and if it is adjourned the Taxing Master sends notice by post of the adjournment

Proceedings
on taxation.

Lodging bill,
&c.

Appointment
to tax.

(*h*) Order LXV. r. 18.

to parties not attending. If any bills or vouchers are not left within the time directed, and generally if any party delays or impedes the taxation, he forfeits his charges in respect of drawing his bill of costs and attending taxation, unless the Taxing Master otherwise directs (*i*).

Certificate of taxation.

The Master finally gives his certificate of taxation, in which he certifies what is the amount of each party's costs, and when they are to be paid out of a fund in Court he must state therein the names and addresses of the persons respectively to whom such costs are payable, and in this case the certificate must be printed or partly printed, and be in a prescribed form, and a duplicate or office copy thereof is sent to the Paymaster so that he may prepare the cheques (*j*). If any party entitled to costs neglects to bring in his bill for taxation, or to procure the same to be taxed, the Taxing Master may certify the costs of the other parties and certify such neglect, or may allow such party so neglecting a nominal or other sum for such costs, so as to prevent any other party being prejudiced by his conduct (*k*).

Certifying separately.

Course where costs increased by delay, &c.

It is also provided that if in any case in which payment of costs is directed out of a fund or estate, or the assets of a company in course of liquidation, the costs have been increased by delay, improper, vexatious, or unnecessary proceedings, or if from any cause the amount of the costs are excessive, having regard to the value of the estate, funds, or assets, or other circumstances, the Taxing Master shall allow only such amount of costs as would have been incurred if the litigation had been properly conducted, and shall assess the same at a gross sum, subject to revision thereof by the Judge (*l*). It is also provided that if on the

Course where taxation against a fund and one-sixth taxed off bill.

(*i*) Order LXV. rr. 19a to 19h.

(*j*) Supreme Court Funds Rules, 1894, r. 12.

(*k*) Order LXV. r. 27 (28). Generally on the subject of Costs and Taxation of Costs, see Order LXV., and ante, pp. 171, 181.

(*l*) Order LXV. r. 27 (38a).

taxation of a bill of costs payable out of a fund or an estate, or the assets of a company in liquidation, the amount of the professional charges contained in a bill is reduced by a sixth part, no costs shall be allowed to the solicitor leaving the bill for taxation, for drawing and copying it, nor for attending the taxation (*m*).

It should be noticed that the County Courts have a ^{County Court jurisdiction.} general jurisdiction in Equity where the matter in dispute does not exceed £500 in value (*n*). There is no absolute rule that because the matter in dispute does not exceed £500 proceedings must be brought in the County Court, but if in such a case the proceedings are instituted in the High Court, application may be made by any party for an order to transfer it to the County Court, and the Judge shall have power to make such order if he thinks fit (*o*). If an Equity matter commenced in a County Court is found to exceed the jurisdiction, it is the duty of the County Court Judge to direct it to be transferred to the Chancery Division of the High Court, but the validity of any order already made is not affected, and a Judge of the Chancery Division may on application order the action still to proceed in the County Court if he thinks fit, notwithstanding the excess of jurisdiction (*p*).

(*m*) Order LXV. r. 27 (38b). This must not be confused with the position as regards a solicitor's bill being taxed against his client, and a sixth being then taxed off, as to which see ante, p. 179.

(*n*) 51 & 52 Vict. c. 43, s. 67, which section sets out specifically the various Equity matters in which the County Court has jurisdiction. As to their jurisdiction in matters coming within the Queen's Bench Division, see ante, p. 173, note (*ii*).

(*o*) 51 & 52 Vict. c. 43, s. 69.

(*p*) Ibid. s. 68.

CHAPTER V.

OF CERTAIN SPECIAL PROCEEDINGS.

It has been stated (*a*) that in some cases proceedings may be commenced by petition, motion, summons, and special case. These require to be noticed, as also do one or two other special proceedings.

Petitions,
motions, and
summonses
defined.

A petition, when dealing with it as an interlocutory proceeding, we defined as a written application to the Court containing a statement of facts and praying for a certain order (*b*). A motion has already been defined, when dealing with it as an interlocutory proceeding, as an application made to the Court without any written statement (*c*). A summons has also been defined, when dealing with it as an interlocutory application, as a written application made to a Judge in Chambers (*d*). Each of these definitions is equally applicable to a petition, motion, or summons respectively as a means of commencing proceedings, except that then the particular proceeding is specially allowed by the provision of some statute or rule of Court. An originating summons is defined by the Rules as "Every summons other than a summons in a pending matter" (*dd*).

Generally as
to petitions.

A petition as a mode of commencing proceedings is intituled or headed in the matter of the Act of Parliament under which the petition is presented, and also

(*a*) Ante, p. 190.

(*c*) Ante, p. 223.

(*dd*) Order LXXI. r. 1a.

(*b*) Ante, p. 222.

(*d*) Ante, p. 224.

in the matter of the particular trust, or property, or person to which it relates, and should state the facts concisely, and be divided into paragraphs numbered consecutively (*e*). As has already been stated with regard to interlocutory petitions (*f*), the petition is lodged at the Registrar's Office, and in addition an originating petition in the Chancery Division has to be marked with the name of one of the Judges, to be ascertained in the same way as in the case of an action commenced in the Chancery Division, and if the applicant is under disability there must be a next friend as in the case of an action (*g*). Every petition states at its foot the names of the persons on whom it is proposed to serve it, who are called the respondents, and if no person is intended to be served, a statement to that effect is made at the foot thereof (*h*). The petition, being presented, it is answered as before explained in the case of interlocutory petitions (*i*). The petition does not require to be signed by counsel. If any parties to it are under disability, the same rules apply as in the case of parties to an action being under disability.

Service of the petition is effected by delivering to the person to be served, a true copy of the petition with the foot-note and the fiat (*k*) thereon and at the same time showing him the original. The rules generally as to service of a writ in an ordinary action (*l*) apply to service of a petition, but it appears that leave cannot be given to serve an originating petition out of the jurisdiction (*m*). At least two clear days must elapse

(*e*) Order LII. r. 18.

(*f*) Ante, p. 222.

(*g*) Order v. r. 9. Order LII. r. 16, see ante, pp. 39, 40, as to next friend, and ante, p. 190, as to the mode of ascertainment of the particular Judge.

(*h*) Order LII. r. 16.

(*i*) Ante, p. 222.

(*k*) That is the "answering" of the petition—viz., the date of bearing, &c.

(*l*) Ante, pp. 47, 48.

(*m*) Re *Busfield*, 32 Ch. D. 123; 55 L. J. Ch. 467; 54 L. T. 220. Re *Jellard*, 39 Ch. D. 424; 60 L. T. 87; Annual Practice, (1897) 968, notes to Order LII. r. 17.

Service of
petition.

between the service of the petition and the day appointed for its hearing (*n*). Generally the same rules apply as to the hearing and subsequent drawing up and perfecting of the order made upon an originating petition as have already been mentioned in considering interlocutory petitions (*o*).

We will now proceed to notice some particular instances of proceedings commenced by petition :

Petitions
under Trustee
Act, 1893.

Payment into
Court.

Former
provisions
now repealed.

1. *Petitions under the Trustee Act, 1893 (p)*.—This is an important Act consolidating the law with regard to trustees, and repealing various statutes (*q*) under which formerly applications to the Court might be made. It provides (*r*) that trustees (*s*) or the majority of them, having in their hands, or under their control, money or securities belonging to a trust, may pay the same into the High Court, and the same shall, subject to rules of Court, be dealt with as the Court may order. If there are several trustees and they do not all agree, the Court may order the payment into Court to be made by the majority. This is in substitution for the now repealed provisions of the Trustee Relief Acts, 1847 and 1849, and also for the provision in the Legacy Duty Act, 1796 (*t*), which is repealed, under which formerly

(*n*) Order LII. r. 17.

(*o*) Ante, p. 225 ; see also p. 223, as to Costs on Petitions.

(*p*) 56 & 57 Vict. c. 53.

(*q*) Particularly the following: 36 Geo. III. c. 52, s. 32 (The Legacy Duty Act, 1796) ; 10 & 11 Vict. c. 96, and 12 & 13 Vict. c. 74 (Trustee Relief Acts, 1847 and 1849) ; portions of 13 & 14 Vict. c. 60, and 15 & 16 Vict. c. 55 (The Trustee Acts 1850 and 1852) ; 22 & 23 Vict. c. 35, s. 30 (Lord St. Leonards' Act allowing a petition to be presented to the Court by trustees for the Court's opinion) ; 25 & 26 Vict. c. 108 (The Confirmation of Sales Act).

(*r*) 56 & 57 Vict. c. 53, s. 42.

(*s*) This includes express, implied, and constructive trustees, and an executor or administrator, but "a trust" does not include "the duties incident to an estate conveyed by way of mortgage" (s. 50). It may therefore be doubted whether a mortgagee who has sold under his power of sale, and has a balance in his hands, can now pay it into Court as he certainly could have done formerly.

(*t*) See the meaning of the expressions "trust" and "trustee" given in s. 50, *supra*, note (*s*).

the amount of a legacy might be paid into Court by an executor after paying the legacy duty where the legatee was an infant or beyond seas. The object of the provision is, as was also the object of the repealed provisions, to afford to persons occupying the position of trustees or personal representatives of a deceased person, a means in the event of difficulties or disputes arising, of having the same removed and freeing themselves from responsibility.

Where it is desired to make a payment into Court under this provision, the trustee must file an affidavit, intituled in the matter of the trust and of the Act, and setting forth a short description of the trust, the names of the persons interested and their addresses to the best of his knowledge and belief, his submission to answer all such inquiries as the Court may direct, and the place where he is to be served with any proceedings (*u*). There must also be annexed to the affidavit a printed lodgment schedule setting forth the trustee's name and address, particulars of the fund, and other details, including a statement whether the money is to be invested and on what securities; and on production of an office copy thereof the Paymaster General issues directions, and the money or stock is paid or transferred into Court without any order for that purpose, and if the money is to be invested, it will be invested if and when it amounts to £40, and any accruing dividends will also be invested if and when they amount to £20 (*w*).

The payment into Court being made, the trustees must forthwith give notice by prepaid letter through the post to the several persons mentioned in the affidavit as being interested (*x*). One or more of these persons then presents a petition setting forth the facts of the

Procedure
under this
provision.

Notice of
payment in.

Petition.

(*u*) Order LIVb. r. 4.

(*w*) Supreme Court Funds Rules, 1894, rr. XLI. 73.

(*x*) Order LIVb. r. 4.

Costs.

case and giving an address for service (*y*), asking for the fund to be dealt with and disposed of as he contends it should be. Service is effected on such persons as the Court or Judge may direct (*z*), and the petition then comes on for hearing, it being supported by any necessary affidavits, and the matter is then disposed of by the Court. The costs are in the discretion of the Court, but are most usually directed to be paid out of the fund. A trustee may deduct his costs of payment into Court in the first instance, but he need not do so, and if he does not do so the Court will order payment of his costs, provided of course that he has acted properly in making the payment into Court. If he has improperly taken advantage of the Act when he ought not to have done so, the Court can order him to pay the costs occasioned thereby, but if he has deducted his own costs of payment in, he cannot on the hearing of the petition, be ordered to repay them, though, if it can be established that the costs have been improperly retained by the trustee, an action will lie against him to recover them (*a*).

Payment into
court of
legacies.

Where a fund consists of moneys or securities being, or being part of, or representing, a legacy or residue to which an infant or person beyond seas is absolutely entitled, and on which the trustee has paid the legacy duty or on which no duty is chargeable, the trustee may pay or transfer the same into Court without an affidavit on production of the Inland Revenue certificate, and a request signed by himself or his solicitor; and any money thus paid in is invested if and when it amounts to £40, and the dividends on such investments or the securities transferred into Court are accumulated, and invested if and when they amount to £20 (*b*). The

(*y*) Order LIVb. r. 4.

(*z*) Ibid.

(*a*) *Re Parker*, 39 Ch. D. 303; 58 L. J. Ch. 23.

(*b*) Order LIVb. r. 4. Supreme Court Funds Rules, 1894, rr. 41, 73. No deduction must be made from the amount paid in for costs and expenses (see Schedule to Supreme Court Funds Rules, 1894. Form No. 16 in Annual Practice, (1897) vol. ii. 301).

person or persons entitled may obtain payment out of Court by an *ex parte* petition in a summary way, on proper proof of identity, and if paid in on account of infancy, on proof also of having attained full age. The payment into Court under this provision, of a legacy belonging to an infant, does not constitute the infant a ward of Court (*c*).

In all cases under the Trustee Act, 1893, if the fund paid or transferred into Court does not exceed £1000, or £1000 nominal value, the application must be by summons and not by petition (*d*). When application should be by summons.

Another kind of petition that may be presented under the Trustee Act, 1893, is by trustees asking for leave to sell land apart from the minerals (*e*). This provision is in lieu of that contained in the Confirmation of Sales Act, 1862 (25 & 26 Vict. c. 108), which is repealed. Petition to sell land apart from minerals.

2. *Petitions under the Life Assurance Companies (Payment into Court) Act, 1896 (ee).*—Under this Act a Life Assurance Company may pay into the High Court (or where the head office of the Company is situate within the jurisdiction of the Chancery Court of the County Palatine of Lancaster either into that Court or into the High Court) any moneys payable by them under a life policy, in respect of which, in the opinion of their Board of Directors no sufficient discharge can otherwise be obtained (*f*). Life Assurance Companies Act, 1896.

Where a Company desires to avail itself of this provision an affidavit must be made by the secretary or other authorised officer intituled "In the matter of the Policy No. effected with," &c., giving Procedure under this provision.

(*c*) Daniel's Ch. Pr. 6th ed. 2200, 2201.

(*d*) Order L.V. r. 13a.

(*e*) 56 & 57 Vict. c. 53, s. 44; Order L.V. r. 3.

(*ee*) 59 Vict. c. 8.

(*f*) Sect. 3.

(1) a short description of the policy and the persons appearing to be entitled under it (2) a short statement of all notices received with regard to it, (3) stating that in the opinion of the directors no sufficient discharge can be obtained except by means of payment into Court, (4) submitting to pay into Court such further sum and any costs as may be ordered, (5) undertaking to transmit forthwith to the Paymaster any further notices of claims that may be received, (6) stating the place where the Company may be served with proceedings. No costs or expenses of the payment into Court must be deducted. Notice of payment must then be given by the Company by prepaid letter through the post to the several claimants to the money, and any such claimant may apply by petition to the Chancery Division for payment out of the money, or where the amount does not exceed £1000 the application may be by summons. The petition or summons has to be served on the other claimants, and also on the Company if any further sum or costs are asked against them, but not otherwise (*ff*). The matter is then decided by the Court on the hearing of the petition or summons, and payment out directed to the party entitled.

Petitions under
Lands Clauses
Consolidation
Act, 1845.

3. *Petitions under the Land Clauses Consolidation Act, 1845 (g).*—Prior to this Act every company authorized by Act of Parliament to acquire lands for undertakings or works of a public nature, included in its special Act the powers and provisions which were necessary to enable the company to take such lands; but by this Act the usual provisions were consolidated therein, and were made applicable to all future undertakings authorized by statute, except so far as they might be varied or excepted by the special Act (*gg*).

(*ff*) Rules of Supreme Court (Life Assurance Companies) 1896. See Annual Practice, (1897) vol. ii. 377.

(*g*) 8 & 9 Vict. c. 18, amended by 23 & 24 Vict. c. 106.

(*gg*) Daniel's Ch. Pr. 6th ed. 2137.

The special particular in which we require to notice this Act is in the case of land being taken, in which persons who are under some disability are interested. In such cases the value of the property is arrived at by two surveyors, one nominated by the promoters of the undertaking, and the other by the other party, and if they differ, by a third surveyor appointed by the Board of Trade (*h*) on the application of either party after notice to the other.

The amount of the purchase-money being thus as- Dealing with money.certained, it is on request paid into the Bank with the privity of the Paymaster-General of the Court (*i*), and placed to a proper account there, and invested in Consols until it can be applied to one of the following purposes—viz., (1) the purchase or redemption of the land tax, or discharge of any debt or incumbrance affecting the land in respect of which the money has been paid, or affecting other land settled to the same uses or trusts; (2) the purchase of other lands to be settled to the same uses or trusts; (3) if the money is in respect of any buildings, in removing or replacing such buildings, or substituting others in their stead; (4) in payment to any person becoming absolutely entitled (*j*); or (5) in any way in which capital money may be applied under the Settled Land Act, 1882 (*k*).

Applications under this Act are frequent, for—the Instances of petitions under this Act. money being simply paid into Court as above mentioned—at first, perhaps, a temporary investment may be required, then a permanent investment, and finally payment out of Court to the person absolutely entitled. To accomplish each of these objects different applications have to be made, and the costs of the same, i f proper under the circumstances, fall upon the company.

(*h*) 46 & 47 Vict. c. 15, s. 1.

(*i*) See Supreme Court Funds Rules, 1894, rr. 30, 39.

(*j*) 8 & 9 Vict. c. 18, s. 69.

(*k*) 45 & 46 Vict. c. 38, ss. 21, 32.

Summons in certain cases.

Course where purchase-money under £200 and £20 respectively.

All applications for interim and permanent investments, and for payment of dividends, are now disposed of by summons in Chambers (*l*). It should be mentioned that if the purchase-money does not amount to £200, instead of being paid into Court as just mentioned, it may be paid to two trustees to be nominated on behalf of the persons entitled, in the manner pointed out by the Act; and if the money does not exceed £20 it may instead be paid to the husband, guardian, committee, or trustee of the person entitled to the rents and profits of the lands taken.

Affidavit in support of such petition.

In the case of applications under this or any other Act of Parliament directing the purchase-money of any property sold to be paid into Court, any persons claiming to be entitled to the money so paid in, must make an affidavit, not only verifying their title, but also stating that they are not aware of any right of any other person, or of any claim made by any other person, to the sum claimed, or any part thereof; or if the applicants are aware of any other right or claim, they must in such affidavit state, or refer to, and except the same (*m*).

Petitions under Leases and Sales of Settled Estates Act, 1877.

4. *Petitions under the Leases and Sales of Settled Estates Act, 1877 (n).*—Petitions may, under this Act, be presented for the purpose of making a lease or sale of a settled estate which could not otherwise be leased or sold on account of its being in settlement. It is rarely necessary now to have recourse to this Act, on account of the provisions of the Settled Land Act, 1882 (*o*).

5. *Petitions to wind up Companies.*—This is a subject now regulated by the Companies Winding-up Act,

(*l*) Order LV. r. 2 (7).

(*n*) 40 & 41 Vict. c. 18.

(*o*) 45 & 46 Vict. c. 38. See as to applications under that Act by summons, post, pp. 273, 274.

(*m*) Order LII. r. 18.

1890 (*p*) and the Rules issued thereunder. The business is now specially assigned to an individual Judge (*q*). The matter therefore stands by itself, and appears to be outside the scope of the present work, and the student is referred to the Act and Rules or to any work dealing with the subject of Company Law (*r*).

A motion as a means of commencing proceedings is not of constant occurrence. An instance of it would, however, occur in the enforcing of an agreement for the remuneration of a solicitor under the Solicitors Remuneration Act, 1870 (*s*), or to rectify the Register of Trade Marks by striking out a trade mark wrongly registered (*ss*), or that a solicitor should answer matters on affidavit, or be struck off the Rolls. With regard to such motions as these against solicitors, the notice of motion must state in general terms the grounds of the application; a copy of any affidavit intended to be used must be served with the notice of motion (*t*); and the notice of motion must be served not less than ten clear days before the time fixed by the notice for making the application, instead of two days as in ordinary cases (*u*). An originating notice of motion is served in the same way as a writ of summons, and leave cannot be given for service out of the jurisdiction (*uu*).

Instances of motions originating proceedings.

Motion as to solicitors.

Where the commencement of any proceeding in the Chancery Division is by motion, the notice of motion

Assigning to particular Judge.

(*p*) 53 & 54 Vict. c. 63.

(*q*) Mr. Justice Vaughan Williams, see order of Lord Chancellor of 26th March, 1892.

(*r*) See Eustace Smith's Summary of the Law of Companies. The subject of Company Law generally, is of so much practical importance that a perusal of this small work is very advisable, and besides dealing with the general law relating to Companies, it also deals with procedure.

(*s*) 33 & 34 Vict. c. 28, s. 8.

(*ss*) 46 & 47 Vict. c. 57, s. 90.

(*t*) Order LII. r. 4.

(*u*) Ibid. r. 5.

(*uu*) *Re Compagnie Général d'Eaux Minérales*, (1891) 3 Ch. 451; 60 L. J. Ch. 728.

must be taken to the writ department of the Central Office, and it is the duty of the proper officer there to mark the same with the name of one of the Judges, to be ascertained in the same way as in the case of an action commenced in the Chancery Division (*v*).

Summonses.

Summonses as a mode of commencing proceedings are of very considerable practical importance, and the procedure thereon has recently been much altered (*w*).

Issue and service.

The summons is prepared by the applicant or his solicitor, and in the Chancery Division is assigned to a particular Judge, as has been detailed with regard to a writ of summons (*x*). It is sealed with the seal of the Central Office and a copy is filed there (*y*), and it requires the defendant or respondent to enter an appearance within eight days (*yy*), except in certain specified cases in which no formal appearance is required to be entered—*e.g.*, summonses relating to solicitors, summonses under the Arbitration Act, 1889, and interpleader summonses (*z*). Generally the same rules as to service apply as have been detailed with regard to a writ of summons (*a*), but service out of

Default of appearance.

the jurisdiction cannot be allowed (*b*). If the defendant or respondent makes default in appearance, the plaintiff or applicant may apply for an appointment for the hearing of the summons, and upon a certificate that no appearance has been entered a time is appointed

Appearance.

for the hearing of the summons (*c*). It is necessary that the defendant or respondent should enter an appearance at the Central Office before he can be heard, and

(*v*) Order v. r. 9; see ante, p. 190, as to the mode of ascertainment of the particular Judge.

(*w*) See forms in Appendix II. hereto, post, p. 321, 322.

(*x*) Ante, p. 190.

(*y*) Order LIV. r. 4b.

(*yy*) Order LIV. r. 4c.

(*z*) See list of Summonses to which no formal appearance necessary. Order LIV. r. 4f.

(*a*) See ante, pp. 47, 48.

(*b*) Re *Busfield*, 32 Ch. D. 123; 55 L. J. Ch. 467; 54 L. T. 220.

(*c*) Order XIII. r. 15.

give notice thereof, and if he appears after the time limited it is provided that he shall not be entitled to any further time for any purpose than if he had appeared according to the summons (*d*). After appearance the day and hour for attendance before the Judge or Master is given by notice sealed with the seal of the Central Office in the case of a summons issued in the Queen's Bench Division, or of the chambers of the Judge to whom such summons is assigned in the case of a summons issued out of the Chancery Division, and this notice is served on the defendant or respondent by delivering a copy thereof at the address for service named in the memorandum of appearance, not less than four clear days before the return day (*e*). Hearing of summons.

We will now proceed to deal with particular instances of originating summonses:—

1. *Summonses for the Administration of the Estates of Deceased Persons* (*f*).—An originating summons for this purpose may be issued by the executors or administrators of a deceased person or any of them, or the trustees under any deed or instrument or any of them, or by any person claiming to be interested in the relief sought as creditor, devisee, legatee, next of kin, heir-at-law, customary heir, or *cestui que trust*, or as claiming from such beneficiaries by assignment or otherwise, for the administration of the real or personal estate of the deceased, or of any trust. The hearing takes place in Chambers, and on account of this, the proceedings are usually less expensive, and more expeditious, than an action for the purpose. This mode of proceeding should only be had recourse to in simple cases, and provided there is no special or peculiar relief sought; thus, an executor or administrator cannot be charged with wilful Administration summons.

(*d*) Order LIV. r. 4c.
(*f*) Order LV. i. 4.

(*e*) Ibid. r. 4d.

Order for general administration cannot be made by a Master.

default on such a summons (*g*). It should be noticed that no order for general administration, or for execution of trusts, or for accounts and inquiries concerning the property of a deceased person, or any property held upon trust, or the parties entitled thereto, can be made except by a Judge in person (*h*); so that although such a summons comes before the Master in the first instance, his duties are confined to entering the evidence and seeing generally that the matter is in order, and he must then adjourn it to the Judge in Chambers.

Stay of action for administration after order made on summons.

If an action for administration is brought after an order has been made upon an administration summons, the action will be stayed unless further relief can be obtained in the action than upon the summons (*i*). The practice to be observed as to service of notice of the order, and obtaining leave to attend the proceedings, and generally, is the same as in an ordinary action except as before mentioned, and except also that the further consideration is brought on in Chambers if it was originally adjourned to come on in this way (*j*). When this is the case the practice is to issue a summons for the purpose, which may be taken out by the plaintiff, or other party having the conduct of the proceedings, after eight days from the filing of the Master's certificate; and after the expiration of fourteen days from the filing of the certificate such summons may be taken out by any other party. The summons must be served not only upon the parties to the suit, but also upon any persons who have been served with notice of the order for administration and have appeared. Six days must elapse between the service and hearing of the summons (*k*).

General proceedings.

Further consideration in Chambers.

(*g*) *Re Hengler, Frowde & Hengler*. W. N. (1893) 37; *Law Students' Journal*, April 1893, p. 77.

(*h*) Order L.V. r. 15a.

(*i*) *Daniel's Ch. Pr.* 6th ed. 994, 995.

(*j*) Order L.V. r. 72. For other cases in which the further consideration may be brought on in Chambers, see *ante*, pp. 243, 244.

(*k*) Order L.V. r. 72.

2. *Summonses under Order LV. Rule 3.*—All such persons as have been mentioned as capable of taking out an originating summons for general administration, may also take out an originating summons returnable in the Chambers of a Judge of the Chancery Division, for such relief of the nature or kind following as may by the summons be specified, and as the circumstances of the case may require, that is to say, the determination, *without an administration of the estate or trust*, of any of the following questions or matters :—

Originating
summonses
under Order
LV. r. 3 for
certain limited
purposes.

- (a) Any question affecting the rights or interests of a person claiming to be creditor, devisee, legatee, next of kin, heir-at-law, or cestui que trust :
- (b) The ascertainment of any class of creditors, legatees, devisees, next of kin, or others :
- (c) The furnishing of any particular accounts by the executors or administrators or trustees, and the vouching (when necessary) of such accounts :
- (d) The payment into court of any money in the hands of the executors or administrators, or trustees :
- (e) Directing the executors or administrators or trustees to do or abstain from doing any particular act in their character as such executors or administrators or trustees :
- (f) The approval of any sale, purchase, compromise, or other transaction :
- (g) The determination of any question arising in the administration of the estate or trust (*l*).

When Master
has no
jurisdiction.

It is specially provided that a summons under this provision, the object of which is to obtain the opinion of the Court or a Judge upon the construction of a document or any question of law, must be brought before the Judge in person (*m*).

Importance of
Order LV. r. 3.

It will be noticed that the great importance of Order LV. Rule 3, is in enabling certain things to be done without a general administration. To have had the assistance of the Court in any of the foregoing matters would formerly have necessitated a suit for the general administration of the estate, or for the general carrying out the trusts of the settlement, or will. The provisions of the Rule are very wide, and enable almost any point to be determined in this way, but still the Rule only extends to matters which previously could have been determined in an administration suit, and does not confer on the Court any more extended power than that (*n*).

Extent of
interference of
summons with
executor's
powers.

The issue of a summons under Order LV. Rule 3 does not interfere with or control any power or discretion vested in any executor, administrator, or trustee, except so far as any such interference or control may necessarily be involved in the particular relief sought (*o*).

General points
to be observed
on both the
summonses
already dealt
with.
Parties to be
served.

The persons to be made defendants and to be served with either of the two summonses at present dealt with are, generally, the parties interested, the residuary legatees, or next of kin, or some of them, or the executors or administrators, as the case may be (*p*); and the Court or Judge may direct such other persons to be served as they or he may think fit (*q*). Either

Evidence.

(*m*) Order LV. r. 15.

(*n*) Re *Carlton*, 56 L. J. Ch. 219; 56 L. T. 151; 35 W. R. 155; Re *Bridge, Franks v. Worth*, 56 L. J. Ch. 779; 56 L. T. 726; 35 W. R. 663; Re *Royle, Hoyle v. Hayes*, 48 Ch. D. 18; 59 L. J. Ch. 1; 61 L. T. 442.

(*o*) Order LV. r. 12.

(*p*) Ibid. r. 5.

(*q*) Ibid. r. 6.

of such summonses must be supported by such evidence as the Court or Judge may require, and such directions may be given as they or he may think just for the trial of any question arising thereon (*r*). The Court or Judge may give any special directions touching the carriage or execution of the judgment pronounced, or the service thereof upon persons not parties as they or he may think just (*s*); but it is not obligatory on the Court or a Judge to pronounce or make a judgment or order, whether on summons or otherwise, for the administration of any trust, or of the estate of any deceased person, if the questions between the parties can be properly determined without such judgment or order (*t*).

When either of such summonses as we have at present dealt with has been taken out, every subsequent summons relating to the same estate or trust must be marked with the name of the Judge to whom for the time being the matter is assigned, and in case any such subsequent summons shall be marked with the name of another Judge, it is the duty of the executors, administrators, or trustees to apply for the transfer to such first-mentioned Judge of such subsequent summons (*u*), who may without further consent order the transfer accordingly (*v*).

3. *Summonses under Order LIV.a* (*w*).—This is a new provision under the Supreme Court Rules of Nov. 1893, and is an extension of the principle of Order LV. Rule 3. It is provided that, in any Division of the High Court, any person claiming to be interested under a deed, will, or other written instrument, may apply by originating summons for the determination of any question of construction arising under the instru-

(*r*) Order LV. r. 7.

(*s*) *Ibid.* r. 9.

(*t*) *Ibid.* r. 10; *Alexander v. Calder*, 2 Ch. D. 457.

(*u*) Order LV. r. 11.

(*v*) Order XLIX. r. 6.

(*w*) Order LIVa.

Any second summons relating to same estate to be assigned to same Judge.

Summonses under Order LIVa. for construction of some document.

ment, and for a declaration of the rights of the persons interested; but the Court or a Judge are not bound to determine any such question of construction if of opinion that it ought not to be determined on originating summons. The Court or a Judge may direct such persons to be served with the summons as they or he may think fit, and any such application must be supported by such evidence as the Court or a Judge may require.

Summonses
under Trustee
Act, 1893.

Appointment
of new
trustees.
Vesting
orders.

Former
provisions
repealed.

Evidence, &c.

4. *Summonses under the Trustee Act, 1893 (x).*—It has already been pointed out (*y*) that with regard to funds or money in court, any application is to be by summons instead of by petition when the money or securities in court do not exceed £1000 or £1000 nominal value. This Act also provides (*z*) that whenever expedient, or if it is difficult to do so without coming to the Court, the Court may make an order for the appointment of new trustees, and there is a general power also given to the Court of making vesting orders—that is, orders operating as and having the effect of vesting property in any person—and such order may be made on the appointment of new trustees, or quite apart from any appointment, and in all cases that may be necessary. These provisions are in substitution for the former provisions of the Trustee Acts, 1850 and 1852 (*a*), which are now repealed by this new Act (*b*). By the Rules issued under this Act all such applications are now to be by summons (*c*). Any summons for the appointment of new trustees must be supported by evidence showing the willingness of the intended new trustee to act, and his fitness, the former point being proved by his written consent signed by him and verified by the signature of his solicitor (*d*),

(*x*) 56 & 57 Vict. c. 53.

(*y*) Ante, p. 259.

(*z*) Sects. 25–41.

(*a*) 13 & 14 Vict. c. 60, and 15 and 16 Vict. c. 55.

(*b*) 56 & 57 Vict. c. 53, s. 51, and Schedule to the Act.

(*c*) Order LV. r. 13a.

(*d*) Order xxxviii, r. 19a.

and the latter point by the affidavit or affidavits of some person or persons well acquainted with him. The affidavit of fitness must not be made by the solicitor of any of the parties. In addition to this, the nature of the trust, the persons interested in it, and the reason of the application, have to be shown by affidavit. Generally, in all cases of summonses under this Act, affidavits must be filed showing the necessary facts, and the necessity or expediency of the Court making the order asked for. Any order made dealing with a legal estate, is liable to the same stamp duty as Affidavit of fitness. Stamps. would have been payable if the same matter had been effected by deed. Thus, an order appointing a new trustee and vesting land in him, would, besides the ordinary judicature stamps, bear two ten-shilling deed stamps.

5. *Summonses relating to Mortgages.*—It is now provided that any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclose or redeem any mortgage, whether legal or equitable, may issue an originating summons, returnable in the chambers of a Judge of the Chancery Division, asking for such relief of the nature or kind following as may by the summons be specified, and as the circumstances of the case may require; that is to say,—Sale, foreclosure, delivery of possession by the mortgagor, redemption, reconveyance, delivery of possession by the mortgagee (e). The persons to be served with such a summons are such persons as, under the existing practice of the Chancery Division, would be the proper defendants to an action for the like relief (f). Trustees, executors, and administrators may now, in foreclosure proceedings, sue and be sued without join-

Summonses under Order LV. rule 5a. relating to mortgages.

(e) Order LV. r. 5a.

(f) Ibid. r. 5b.

ing beneficiaries, subject to the power of the Court to order any such persons to be made parties (*g*).

Guardianship
and mainten-
ance summons.

6. *Summonses for Guardianship and Maintenance (h).*

Evidence in
support.

—The object of such an application as this, is to have a guardian appointed to some infant, and to obtain an allowance for the infant's support. The summons is intituled in the matter of the infant, and is disposed of in Chambers. In support of it evidence must be given of (1) the age of the infant; (2) the nature and amount of his fortune and income; and (3) what relations he or she has (*i*). The fitness of the proposed guardian must also be shown. Of course when there is an existing suit there is no necessity to issue an originating summons, but the application for guardianship and maintenance is made as an interlocutory step therein, and the same evidence will have to be adduced unless it is already before the Court (*j*).

Infant's
appearance on
petition,
motion, or
summons.

Every infant served with a petition, notice of motion, or summons, appears on the hearing by guardian *ad litem* in all cases in which the appointment of a special guardian is not provided for. No order for the appointment of such guardian is necessary, but the procedure is the same as in the case of an infant defendant to an action (*k*).

Summonses
under Infants
Settlement
Act, 1855.

7. *Summonses under the Infant Settlement Act, 1855 (l).*—Under this Act a binding marriage settlement may be allowed by the Court in the case of a male infant at the age of twenty years, and in the case of a female infant at the age of seventeen years. However as regards any power of appointment or dis-

(*g*) Order xvi. r. 8.

(*h*) Order lv. rr. 25, 26.

(*i*) Ibid. r. 25; Daniel's Ch. Pr. 6th ed. 1119.

(*j*) As to this and further generally as to maintenance, see ante, pp. 240, 241.

(*k*) Order xvi. r. 19; ante, pp. 40, 65.

(*l*) 18 & 19 Vict. c. 43.

entailing assurance executed by any infant tenant in tail, it is provided that it is only to take effect if he or she afterwards attains full age (*m*). All such applications must be by summons (*n*); and in support thereof evidence must be adduced to show the following matters: (1) the age of the infant; (2) whether any parents or guardians; (3) with whom the infant is living, and if no parents or guardians, what near relations the infant has; (4) the rank and position in life of the infant (5) what the infant's property and fortune consists of; (6) the age, rank and position in life of the person to whom the infant is about to be married; (7) what property, fortune, and income such person has; (8) the fitness of the proposed trustees, and their consent to act (*o*). The proposals for the settlement of the property of the infant, and of the person to whom such infant is proposed to be married, must be submitted to the Judge (*p*).

Application to be by summons and evidence in support thereof.

Proposals must be submitted to Judge.

8. *Summonses under the Settled Land Acts*, 1882-1890 (*q*).—Under these Acts, with reference to leases and sales of settled estates, applications to the Court are often necessary. All such applications are by summons in Chambers, usually served on the trustees or the tenant for life, as the case may be, and no other person is served in the first instance (*r*). The title of the parties is verified by affidavit (*s*), and, where capital money is to be paid into Court, to enable such payment to be made a summons must be taken out for leave to so pay in, and there must be an affi-

Service of summons.

Evidence in support.

(*m*) *Re Scott, Scott v. Hanbury* (1891), 1 Ch. 298; 60 L. J. Ch. 461; 63 L. T. 800.

(*n*) Order Lv. r. 2 (10).

(*o*) *Ibid.* r. 26.

(*p*) *Ibid.* r. 26. The Court can sanction a settlement of an infant's property under this Act even after the marriage has taken place. *Re Sampson & Wall*, 25 Ch. D. 482; 53 L. J. Ch. 457; 32 W. R. 617; and it can also do this though the infant married before the prescribed age, *Re Phillips*, 34 Ch. D. 467; 56 L. J. Ch. 337.

(*q*) 45 & 46 Vict. c. 38.

(*r*) Settled Land Act Rules, 1882, rr. 2, 4.

(*s*) *Ibid.* r. 7.

davit in support of such summons, shewing (1) the name and address of the person desiring to pay in ; (2) the place where he is to be served with notice of any proceeding relating to the money ; (3) the amount of the money to be paid into Court, and the account to the credit of which it is to be placed ; (4) the name and address of the tenant for life under the settlement, by whose direction the money is to be paid into Court ; and (5) the short particulars of the transaction in respect of which the money is payable (t). The order made on the summons may contain directions for the investment of the money on any securities authorized by the Settled Land Act, 1882 (u), and for payment of the dividends to the tenant for life, either forthwith, or upon production of the consent in writing of the applicant, the signature to such consent to be verified by the affidavit of a solicitor. If, however, the transaction, in respect of which the money arises, is not completed at the date of payment into Court, the money cannot, without the consent of the applicant, be ordered to be invested in any securities other than those upon which cash under the control of the Court may be invested (v). Any person paying capital money into Court is entitled first to deduct the costs of payment in (w). The various provisions of the Supreme Court Funds Rules, 1894, as to payment into and out of Court and dealing with money in Court (x) apply here, and generally, in all other cases.

Directions that may be contained in order for payment in.

Deducting costs of payment in.

Summonses under Vendor and Purchaser Act, 1874.

9. *Summonses under Vendor and Purchaser Act, 1874* (y).—Under this statute disputes arising on requisitions between vendor and purchaser, other than

(t) Settled Land Act Rules, 1882, r. 10.

(u) 45 & 46 Vict. c. 38, s. 21 (1).

(v) Settled Land Act Rules, 1882, r. 12. See ante, p. 234, 235.

(w) Ibid. r. 14.

(x) See ante, pp. 232, 246. Settled Land Act Rules, 1882, r. 15.

(y) 37 & 38 Vict. c. 78, s. 9.

questions affecting the existence or validity of the contract (z), may be summarily disposed of by originating summons in Chambers. It was at one time thought that questions of law or construction only, and not disputed questions of fact, could be decided in this way, but it is now settled that, whatever could be done in chambers upon a reference as to title in a specific performance suit, can be done under such a summons (a). And the Court has power not only to answer the questions submitted to it, but to direct such things to be done as are the natural consequences of the decision; so that when the vendor had not shewn a good title, or answered the requisitions, the Court ordered the vendor to return the deposit with interest at 4 per cent., and to pay the purchaser's costs of the investigation of the title (b). In case of disobedience to an order made under this provision, an application to enforce it should be made in Chambers, and if an action for specific performance is commenced instead, it will be dismissed with costs (c).

A special case as a means of commencing proceedings is rarely if ever used now. It occurs where the parties are agreed on the facts, and simply want a declaration of the Court on a point of law and nothing further. It was originally allowed by the Statute 13 & 14 Vict. c. 35, which was repealed by the Statute Law Revision Act, 1883 (d); but it is still allowed as a means of commencing proceedings under the Rules of 1883 (e). It should be intituled as an action, printed and divided into numbered paragraphs, and

(z) See *Re Jackson & Woodburn*, 57 L. J. Ch. 243.

(a) *Greenwood's Real Property Statutes*, 2nd ed. 206.

(b) *Re Hargreaves & Thompson*, 32 Ch. D. 454; 56 L. J. Ch. 199; 34 W. R. 708; and hereon see and distinguish *Re Davis & Cavey*, 40 Ch. D. 601; 58 L. J. Ch. 143; 60 L. T. 100.

(c) *Thompson v. Ringer*, 29 W. R. 520.

(d) 46 & 47 Vict. c. 49.

(e) Order xxxiv. r. 8. As to a special case in the course of an action see *ante*, p. 125.

signed by the several parties or their counsel or solicitors (*ee*).

Distringas.	A writ of distringas was a writ issued under the Statute 5 & 6 Vict. c. 5, s. 5, for the purpose of restraining the transfer of some fund not in Court, or the payment of the dividends thereon. The process of distringas still exists, but a writ is no longer issued as formerly (<i>f</i>). Any person claiming to be interested in any stock, which includes shares, securities, and money standing in the books of a company (which comprises the Bank of England and other public companies) (<i>g</i>), may on filing an affidavit by himself or his solicitor, in the form given in the Rules of 1883 (<i>h</i>), deposing to the fact of such interest, with a notice in a form also given (<i>i</i>), stating what is intended and desired, and on procuring an office copy of the affidavit and duplicate of the filed notice authenticated by the seal of the Central Office, serve the office copy and duplicate notice on the company, appending to the affidavit a note stating the person on whose behalf it is filed, and to what address notices (if any) to that person are to be sent (<i>j</i>). The effect of this service is the same as the effect formerly of a writ of distringas—viz., not absolutely to prevent any dealing with the stock in question, but that on any application being made to deal with it, notice is given to the person on whose behalf the affidavit was filed (<i>k</i>). Any such notice is to be deemed to have been duly given if sent through the post by a prepaid letter, directed to the person at the address originally stated in the notice served, or any address since substituted, whether such person to whom the notice is sent is living or not (<i>l</i>).
Substituted process.	
Affidavit.	
Notice.	
Effect of service of notice.	

(*ee*) Annual Practice, (1897) 687, notes to Order xxxiv. r. 8.

(*f*) Order XLVI. r. 2.

(*g*) Ibid. r. 3.

(*h*) Ibid. r. 4; Form No. 27 in Appendix B. to Rules of 1883.

(*i*) Ibid.; Form No. 22.

(*j*) Ibid. rr. 4, 5. (*k*) Ibid. r. 8.

(*l*) Ibid. r. 6. Substitution of address may always be effected by

If whilst any such notice continues in force, application is made to deal with the stock or dividends in question, and the person on whose behalf the notice was given does nothing further for the period of eight days from such application, the company cannot refuse to permit the dealing with the stock or dividends as requested, but within this period such person may obtain a restraining order, or commence an action, and in it obtain an injunction against dealing with the stock or dividends in question (*m*). Any notice given as aforesaid may be withdrawn by the person who gave it on a written request signed by him, or its operation may be made to cease by an order to be obtained by motion on notice, or by petition, or by summons at Chambers, duly served by any other person claiming to be interested in the stock sought to be affected by the notice (*n*). If the person who files a notice in the nature of a *distringas*, desires to correct the description of the stock referred to in the filed notice, he may file an amended notice, and serve on the company a duplicate thereof sealed with the seal of the Central Office, and in that case the service of the notice is deemed to have been made on the day on which the amended duplicate is so served (*o*).

Position if application made to deal with stock.

Withdrawal of notice.

Amendment of notice.

A restraining order is closely allied to a *distringas*. It is an order obtained *ex parte* on motion or petition in a summary way, without any regular action being commenced, on evidence that the applicant is interested in a certain fund in the Bank of England or other public company, and that it is about to be wrongfully dealt with. It has the same effect as an injunction, but it is only intended for interim purposes, and an action should afterwards be commenced, and an injunction obtained therein in the ordinary way (*p*).

Restraining order.

service of a memorandum thereof on the company in the manner required for service of the original notice (Order XLVI. r. 7).

(*m*) Order XLVI. r. 10.

(*n*) Ibid. r. 9.

(*o*) Ibid. r. 11.

(*p*) 5 & 6 Vict. c. 5, s. 4.

There does not therefore seem to be much, if any, object to be gained by applying for a restraining order, but where something more than a *distringas* is required, it is better to at once commence an action, and apply therein for an injunction (*q*).

(*q*) See hereon Daniel's Ch. Pr. 6th ed. 1627.

PART IV.

OF APPEAL.

CHAPTER I.

APPEALS TO HER MAJESTY'S COURT OF APPEAL *(a)*.

ALL appeals to Her Majesty's Court of Appeal from ^{Time for} interlocutory orders, or from any order, whether final or ^{appealing.} interlocutory, in any matter not being an action, must now be brought within fourteen days, and appeals from other orders *(b)* within three months, unless special leave is given to bring the appeal after these times *(c)*. Where an *ex parte* application to the Court below has been made and refused, an application to the Court of Appeal for a similar purpose, must be made within four days from the date of such refusal *(d)*. Leave to bring an appeal after these times will only be granted on shewing some special circumstances. The period within which to appeal is calculated in the case of an appeal from an order in Chambers, from the time when such order was pronounced or when the appellant first had notice thereof, and in all other

(a) As to the constitution, &c., of the Court, see ante, p. 18.

(b) It is provided that any doubts which may arise as to what orders are final, and what interlocutory, shall be determined by the Court of Appeal (Jud. Act, 1875, s. 12). As to what orders have been held to be final, and what interlocutory, see Annual Practice, (1887) 1073, notes to Order LVIII. r. 15.

(c) Order LVIII. r. 15. This is an alteration made by the Rules of Nov. 1893. Notwithstanding the way in which Order LVIII. rr. 9, 15, now read, the alteration does not apply to bankruptcy and winding-up business, and the time to appeal in such cases is 21 days.

(d) Ibid. n. 10.

cases from the time at which the judgment or order was signed, entered, or otherwise perfected, or, in the case of the refusal of an application, from the date of such refusal (*e*).

Mode of
appealing.

Appeals take place by way of re-hearing, and are brought by notice of motion in a summary way, and no petition, case, or other formal proceeding, except such notice of motion, is necessary. The notice of motion specifies whether the whole or part only of the judgment or order in question is appealed from, and in the latter case specifies such part (*f*). This notice of appeal—which is a fourteen days' notice if the appeal is from a judgment or a final order, and a four days' notice if from an interlocutory order (*g*)—must be served upon all parties directly affected by the appeal, and it is not necessary to serve parties not so affected; but the Court of Appeal has power to direct notice of the appeal to be served on all or any of the parties to the action or other proceeding, or upon any person not a party, and in the meantime may postpone or adjourn the hearing of the appeal. Any notice of appeal may be amended by leave (*h*). The party appealing is called the appellant, and the party against whom the appeal is directed, the respondent.

Length of
appeal notice.

Setting down.

The notice of appeal having been given, the appeal must be set down for hearing before the day named in the notice for the hearing, or if such day falls in a vacation, before the next day on which the Court sits, otherwise it may on application be dismissed with costs as an abandoned motion (*i*). The appeal is set down by producing to the proper officer of the Court of

(*e*) Order LVIII. r. 15. Where several claims are joined in one application, and some of them are allowed and some refused, the time for an appeal from the refusal runs from the date of the refusal (*Trail v. Jackson*, 4 Ch. D. 72; 46 L. J. Ch. 16; 25 W. R. 36).

(*f*) Ibid. rr. 1, 2.

(*g*) Ibid. r. 3.

(*h*) Ibid. r. 2.

(*i*) Annual Practice, (1897) 1066, notes to Order LVIII. r. 8.

Appeal the judgment or order appealed from, or an office copy thereof, unless the appeal is from the refusal of an application, when this is not necessary (*j*), and also leaving with him a copy of the appeal notice to be filed; the officer then sets down the appeal in the list, and it comes on in its proper order to be heard (*k*). Three copies of the appeal notice and of any other important documents should be lodged in Court for the use of the Judges (*l*).

Ordinarily, no deposit has to be made, or security given, on appealing; but a deposit or other security for the costs to be occasioned by any appeal may, under special circumstances, be directed by the Court of Appeal (*m*). Any application asking for a deposit, or other security, from the appellant, should be made immediately on receiving the notice of appeal; and as to what will constitute special circumstances for the Court to make such an order, the fact of the appellant being out of the jurisdiction of the Court, or in some cases in an insolvent state, or the appeal being considered a speculative or frivolous one, may be sufficient. A mere affidavit of the respondent that he is informed and believes that the appellant will not be able to pay the costs of the appeal is not sufficient (*n*). The fact that the appellant is a married woman without separate estate free from anticipation is a ground on which the Court may, if it thinks fit, order security (*o*). Generally what will or will not in particular cases amount to special circumstances, is a matter for the discretion of the Court (*p*), and security will not as a rule be ordered where high penal consequences affecting the liberty of the appellant, may follow if the appellant is

(*j*) *Smith v. Grindley*, 3 Ch. D. 80.

(*k*) Order LVII. r. 8.

(*l*) Annual Practice (1897) 1066, notes to Order LVIII. r. 8.

(*m*) Order LVIII. r. 15.

(*n*) *McDougall v. Copestake*, 34 Sol. Jl. 347.

(*o*) *Whitaker v. Kershaw*, 44 Ch. D. 296; 62 L. T. 776.

(*p*) *Grill v. Dillon*, 2 Ch. D. 325; 45 L. J. Ch. 432; 24 W. R. 481.
Re Photographic Company, 23 Ch. D. 370; 31 W. R. 509.

shut out by the order from prosecuting the appeal (*pp*). As has been pointed out in a previous part of this work (*q*) motions for new trials are now always made to the Court of Appeal, but the Court of Appeal, following the former practice of the Divisional Courts, will not order security for costs on such applications (*r*).

No notice of motion by way of cross appeal necessary.

It sometimes happens that the respondent to an appeal is also dissatisfied with the judgment or order on some points. In such a case it is not necessary or proper for him to give notice of motion by way of cross appeal, but if he intends, upon the hearing of the appeal, to contend that the decision of the Court below should on any point be varied, he must, if the appeal is from a final judgment, give an eight days' notice, and if from an interlocutory order, a two days' notice of such his intention, to any parties who may be affected by such contention, and the whole matter can be then dealt with at the hearing. It is, however, also provided that the omission to give such notice is not to diminish the power of the Court of Appeal, but may in the discretion of the Court be ground for an adjournment of the appeal, or for a special order as to costs (*s*).

How the evidence below is brought before the Court of Appeal.

An appeal is sometimes only on a point of law, but sometimes it is on a matter of fact. When any question of fact is involved in an appeal, the evidence taken in the Court below, bearing on such question, is, subject to any special order, brought before the Court of Appeal thus: (1) As to any evidence taken by affidavit, by the production of printed copies of such of the affidavits as have been printed, and office copies of such of them

(*pp*) *Hood-Barrs v. Heriot*, (1896) 2 Q. B. 375; 65 L. J. Q. B. 624.

(*q*) *Ante*, p. 152.

(*r*) *Heckster v. Crossley*, (1891) 1 Q. B. 224; 60 L. J. Q. B. 75; Annual Practice, (1897) 1078, notes to Order LVIII. i. 15.

(*s*) Order LVIII. rr. 6, 7.

as have not been printed; and any evidence by affidavit not printed in the Court below, may be ordered to be printed for the use of the Court of Appeal, but should not be printed without such order; (2) As to any evidence given orally, by the production of a copy of the Judge's notes, or such other materials as the Court may deem expedient (*t*).

The Court of Appeal is not necessarily restricted to the evidence used in the Court below, but has full discretionary power to receive further evidence upon questions of fact, such evidence to be either by oral examination of witnesses in Court, by affidavit, or by depositions taken before an examiner or commissioners. Such further evidence may be given without special leave upon interlocutory applications, or, in any case, as to matters which have occurred after the date of the decision from which the appeal is brought. Upon appeals from judgments after trial of any cause or matter upon the merits, further evidence (except as to matters subsequent as just mentioned), is only admitted by special leave of the Court, which may be granted on showing some special grounds (*u*).

A party who wishes to adduce further affidavits or documentary evidence, should give to the other side notice of his intention to apply at the hearing of the appeal for leave to adduce such evidence; but where he wishes to examine fresh witnesses orally, he should apply by motion on notice, previously to the hearing of the appeal (*w*).

The Court of Appeal has all powers as to amendment or otherwise, in the same way as the Court below, and has power to draw inferences of fact, and give any

New evidence
on appeal.

Course when
desired, to
adduce new
evidence.

General
powers of
Court of
Appeal.

(*t*) Order LVIII, rr. 11-13.

(*u*) Ibid. r. 4.

(*w*) *Hastie v. Hastie*, 1 Ch. D. 562; *Dicks v. Brooks*, 13 Ch. D. 652; Annual Practice, (1897) 1060, notes to Order LVIII. r. 4.

judgment, and make any order, which ought to have been made, and to make such further or other order as the case may require, and as to the whole or any part of the costs of the appeal as may be just (*x*). If at the hearing of an appeal it appears to the Court of Appeal that a new trial ought to be had, it is lawful for such Court, if it shall think fit, to order that the verdict and judgment shall be set aside and a new trial be had (*y*).

Costs.

Directing new trial.

Hearing of appeal.

The appeal comes on in due course to be heard. Where the subject-matter of it is a final order, or judgment, the hearing must be before not less than three Judges of the Court sitting together, but when the subject-matter of the appeal is an interlocutory order, or judgment, the hearing may be before two Judges of the Court sitting together, and if any doubt arises as to what judgments or orders are final and what are interlocutory, the point is determined by the Court of Appeal (*z*). No Judge of the Court of Appeal may sit as a Judge on the hearing of any appeal from any judgment or order made by himself, or by any Divisional Court of the High Court of which he was and is a member (*a*). However, a Judge has been held to be competent to take part in an appeal from a Divisional Court of which he is a member, in a case in which he was not one of the sitting Judges when it was heard (*b*). On the argument of the appeal two counsel on each side are allowed to be heard. The Court finally gives its decision, either dismissing the appeal, or discharging, or varying, the judgment or order complained of.

In any cause or matter pending before the Court of Appeal any direction incidental thereto, not involving

(*x*) Order LVIII. r. 4.

(*z*) Jud. Act, 1875, s. 12.

(*b*) *Fisher v. Val de Travers Paving Co.*, 1 C. P. D. 259; 45 L. J. C. P. 135.

(*y*) Ibid. r. 5.

(*a*) Ibid. s. 4.

the decision of the appeal itself, may be given by a single Judge of the Court of Appeal; and a single Judge of the Court may, at any time during vacation, make any such interim order as he may think fit, to prevent prejudice to the claims of any parties pending an appeal; but every such order made by a single Judge may be discharged or varied by the Court (*c*).

Powers of one Judge of the Court of Appeal alone.

An appeal does not of itself stay execution or other proceedings under the decision appealed from; for it to have this effect application must be made to the Court appealed from, or any Judge thereof, or to the Court of Appeal; and no intermediate act or proceeding is invalidated except so far as the Court appealed from may direct (*d*). Any application for a stay of execution, or other proceedings, should be made first to the Court below (*e*), and the application may be made to a Master in the first instance (*f*). As a general rule, if the order is made the applicant will be put under some special terms—*e.g.*, bringing money into Court. Interest for such time as execution has been delayed by the appeal is to be allowed, unless the Court or a Judge otherwise orders, and the Taxing Master may compute such interest without any order for that purpose (*g*).

Staying execution.

Interest allowed for delay.

Where a question has been argued before the Judge himself in Chambers, then, in the Queen's Bench Division, (as has been pointed out) the appeal is direct to the Court of Appeal in matters of practice or procedure, but otherwise to the Divisional Court (*h*). In matters in the Chancery Division the appeal is practically always direct to the Court of Appeal, but application should

Appeal from decision of Judge in Chambers.

(*c*) Jud. Act, 1873, s. 52.

(*d*) Order LVIII. r. 16.

(*e*) Ibid. r. 17.

(*f*) *Oppert v. Beaumont*, 18 Q. B. D. 435.

(*g*) Order LVIII. r. 19.

(*h*) As to appeals from the decision of a Judge in Chambers in the Queen's Bench Division, see ante, pp. 127, 128.

first be made to the Judge for a certificate that he does not require to hear further argument, or to adjourn the summons into Court for argument, otherwise to go direct from Chambers to the Court of Appeal, leave must be obtained from the Court of Appeal to set down the appeal without such certificate. Such an application will be granted as a matter of course if the Court is satisfied that the case has been fully argued before the Judge below, and that such Judge did not desire to hear further argument (*i*).

Orders not
subject to
appeal.

Orders made by consent, or as to costs only (*j*), which are by law left to the discretion of the Court, are not subject to appeal, except by special leave of the Court or Judge making such order (*k*). And where any Act of Parliament provides that any decision shall be final no appeal lies (*l*). There is also no appeal from an order made by a Judge in Chambers under the Charitable Trusts Acts, 1853 (*m*), where the gross annual income of the charity has not been declared by the Charity Commissioners to exceed £100, unless by special leave (*n*). There is also no appeal in interpleader matters, except by special leave (*o*).

(*i*) Jud. Act, 1873, s. 50, and notes to that section in Annual Practice (1897) 64.

(*j*) If the Court has ordered a defendant to pay costs where the plaintiff had no right to sue, an appeal will lie, this not being as to costs only, for the Court has here exceeded its jurisdiction. *Dicks v. Yates*, 18 Ch. D. 76; 50 L. J. Ch. 809; *Foster v. Great Western Railway Co.*, 8 Q. B. D. 515; 51 L. J. Q. B. 233; 30 W. R. 398.

(*k*) Jud. Act, 1873, s. 49. See *Koosen v. Rose*, Law Journal Notes of Cases, 13th March, 1897, p. 148; Law Students' Journal, April 1897; ante, p. 69.

(*l*) 39 & 40 Vict. c. 59, s. 20.

(*m*) 16 & 17 Vict. c. 137, s. 28.

(*n*) Order LV. rr. 13, 14.

(*o*) Order LVII. r. 11. See further ante, p. 124. There is also no appeal in criminal matters except for error apparent on the face of the record, or except on a point specially reserved for consideration. It has been decided that the jurisdiction exercised by the Court in striking a solicitor off the rolls is of a disciplinary and not a criminal nature, and therefore an appeal lies from such an order. (*Re Hardwick*, 12 Q. B. D. 148; 53 L. J. Q. B. 64; 32 W. R. 191). There is ordinarily an appeal from an order committing a person for contempt of Court; but where the contempt consists of an attempt to prevent the course of justice, it is a matter of a criminal nature, and no appeal lies from the Court's decision thereon. (*O'Shea v. O'Shea*, 15 P. D. 59; 59 L. J. P. 47; 62 L. T. 713).

The old processes of appeal by Bill of Exceptions, and proceedings in error are abolished, and do not require to be considered here. It may, however, be noticed that the old jurisdiction of the Court of Chancery to entertain an action in the nature of a Bill of Review, has been held to be unaffected by the Judicature Acts (*p*). A Bill of Review was in the nature of proceedings in error, and its object was to procure an examination and alteration, or reversal, of a final decree in Chancery duly signed and enrolled. The Bill was filed either for error apparent on the face of the decree without any further examination of matter of fact, or with leave of the Court, upon the discovery of new matter (*q*). An application for leave to institute an action in the nature of a Bill of Review is, however, strictly part of the original jurisdiction of the High Court, and such an application should be made to the High Court and not to the Court of Appeal, which has no original jurisdiction of this kind (*r*).

Bill of
Exceptions,
and proceed-
ings in error.

Action in the
nature of Bill
of Review.

Under the old practice the enrolment of a decree or order in Chancery prevented any appeal except to the House of Lords. There is, however, now no object to be gained by enrolment, for the powers of the Court of Appeal are specially vested in it by the Judicature Act, 1873 (*s*).

Enrolment.

(*p*) *Falcke v. Scottish Imperial Insurance Co.*, 57 L. T. 39; 35 W. R. 794.

(*q*) Wharton's Law Lexicon, 7th ed. 735, tit. "Review, Bill of."

(*r*) *Falcke v. Scottish Imperial Insurance Co.*, *supra*, Annual Practice, (1897) p. 556, notes to Order xxiv. r. 1.

(*s*) 36 & 37 Vict. c. 66, s. 19. *Hastie v. Hastie*, 2 Ch. D. 304; 34 L. T. 747.

CHAPTER II.

APPEALS TO THE HOUSE OF LORDS (*a*).

Mode of
appealing to
House of
Lords.

EVERY appeal to the House of Lords is brought by way of petition, praying that the matter of the order or judgment appealed against may be reviewed before Her Majesty in her Court of Parliament (*b*). A form of petition is given by the Orders of November 1876, under the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), and it must be signed by two counsel, who have either attended as counsel in the Court below, or purpose attending as counsel at the hearing in the House of Lords, and they must certify that, in their opinion, it is a proper case to be heard before the House (*c*). The time limited for presenting petitions to the House is within one year from the date of the judgment or order appealed from (*d*).

Presentation
of appeal, &c.

The appeal is printed on parchment, and duly lodged in the Parliament Office, for presentation to the House, and an order is issued thereon for service on the respondents or their solicitors, ordering them to lodge cases in answer to the appeal, which order must be returned to the Parliament Office, together with an affidavit of service, within six weeks' time, or, in the case of Irish and Scotch appeals, within eight weeks' time (*e*).

(*a*) As to origin and present constitution of the House of Lords as the ultimate Court of Appeal, see ante, p. 28.

(*b*) 39 & 40 Vict. c. 59, s. 4.

(*c*) Standing Order 2.

(*d*) Ibid. 1.

(*e*) Ibid. 3, and Orders of November 1876, under Appellate Jurisdiction Act.

Within one week after the presentation of the appeal, ^{Security.} security must be given for the costs of it. The security consists of the appellant's own recognizance to the amount of £500, and the payment in by him to the account of the Fee Fund of the House of Lords, of the sum of £200, or, instead of that payment, the giving of a bond with two sufficient sureties to the amount of £200. In the event of this latter mode of security being adopted, two clear days' previous notice of the names proposed must be given to the solicitor or agent of the respondent. The recognizance and bond must be returned into the Parliament Office, duly executed, within one week from the date of their having been issued to the solicitor or agent of the appellant. On default by the appellant in complying with the above requirements, the appeal stands dismissed (*f*).

The appeal having been lodged, the order served, and ^{Printed cases.} the security given, the next step is the lodging by the parties of their cases in the Parliament Office. These cases contain the different parties' statements, and must be printed; in English appeals they must be lodged within six weeks from the date of the presentation of the appeal, and in Scotch and Irish cases within eight weeks. The cases must be signed by one or more counsel who have attended as counsel in the Court below, or who propose attending as counsel at the hearing in the House (*g*). If the parties are able to agree on their statement of the subject-matter, a joint case may be lodged, with reasons *pro* and *con*. In addition to the printed cases or case, a printed appendix, or printed appendices, also have to be lodged, consisting of such documents or parts thereof used in evidence in the Court below, as may be necessary for reference on the argument of the appeal (*h*).

(*f*) Standing Order 4.

(*g*) *Ibid.* 5.

(*h*) Orders of November 1876, under Appellate Jurisdiction Act.

Cross appeals. If any respondent is dissatisfied with the judgment or order complained of by the appellant, he must, within the time above mentioned for lodging his case, present a cross appeal (*i*).

Setting down of appeal. The appeal is set down for hearing on the first sitting day after the expiration of the time allowed for the respondent to lodge his case, or as soon before, at the option of either party, as all respondents' cases have been lodged. On default by the appellant, the appeal stands dismissed (*j*).

Hearing and disposal of appeal. The appeal in due course comes on to be argued, and is disposed of by the decision of the House, which may make an order as to payment of costs, and provision is made for the taxation of such costs (*k*).

(*i*) Standing Order 6. Orders of November 1876, under Appellate Jurisdiction Act.

(*j*) Standing Order 5.

(*k*) See Synopsis of Procedure on Appeals to the House of Lords, Annual Practice, (1897) vol. ii. 394-397.

CHAPTER III.

APPEALS FROM INFERIOR COURTS.

APPEALS from inferior Courts, which might, under the old practice, have been brought to any Court or Judge whose jurisdiction is now transferred to the High Court of Justice, may be heard before a Divisional Court of the High Court, and the determination of any such appeal by a Divisional Court is final, unless special leave to appeal from the same to the Court of Appeal is given by the Divisional Court before which any such appeal from an inferior Court has been heard (*a*). Every Judge of the High Court for the time being, is a Judge for the purpose of hearing and determining these appeals as just mentioned. All such appeals (except Admiralty Appeals, which are assigned to the Admiralty Division), are entered in one list by the officers of the Crown Office Department of the Central Office of the Supreme Court, and are heard by such Divisional Court composed of the Judges of the Queen's Bench Division, as the President of that Division from time to time directs (*b*).

The most usual appeals from inferior Courts occurring in practice, are appeals from County Courts, which appeals are allowed on points of law or equity, or questions of admission or rejection of evidence ; but in cases the subject-matter of which does not exceed £20,

Appeals to be
to Divisional
Courts.

County Court
appeals.

(*a*) Jud. Act, 1873, s. 45. Order LVIII. r. 1. It may be noticed that it has been decided that an appeal from the Lord Mayor's Court lies to a Divisional Court only, and that there is no appeal therefrom to the Court of Appeal without special leave. *Appleford v. Judkins*, 3-C. P. D. 489 ; 26 W. R. 734.

(*b*) Order LIX. r. 4. Appeals from orders made under the Summary Jurisdiction (Married Women) Act, 1895, are, however, heard by a Divisional Court of the Probate, Divorce, and Admiralty Division and are entered in the Divorce Registry instead of at the Crown Office. (Order LIX. r. 4a). See Annual Practice, (1897) 1088 ; *Manders v. Manders*, Weekly Notes (1897), 7 ; Law Students' Journal, March 1897, p. 50.

or in actions for the recovery of tenements where the full rent or value does not exceed that sum, leave of the County Court Judge must be obtained (*c*). These appeals might until lately have been either in the form of a special case, or by motion, but are now only by motion (*d*).

Practice on
appeals from
County Courts.

The practice on such appeals is as follows :—Notice of motion is given, and the appeal entered at the Crown Office Department of the High Court within 21 days of the judgment, order, or finding complained of (or such extended time as may be allowed by the High Court), such period being calculated from the time at which the judgment or order is signed, entered, or otherwise perfected, or from the time at which the finding or any refusal is made or given. The notice is an eight days' notice. The appellant must supply the Court with copies of the Judge's notes as a condition precedent to the hearing of the appeal (*e*), and the Judge is bound to furnish his notes on application being made to him (*f*). The appeal does not operate as a stay of execution unless so ordered by the inferior Court, or unless, within ten days of the decision complained of, a deposit is made, or security given, to the satisfaction of the inferior Court, in a sum to be fixed by such Court, not exceeding the amount affected by the decision appealed from (*g*).

Appeal, no
stay of
execution.

When no
appeal from
County Court.

No appeal lies from the decision of a County Court, if, before such decision is pronounced, both parties agree in writing, signed by themselves or their solicitors or agents, that the decision of the Judge shall be final. Such an agreement requires no stamp (*h*).

(*c*) 51 & 52 Vict. c. 43, s. 120; *Reg. v. Kettle*, 17 Q. B. D. 761; 55 L. J. Q. B. 470; 54 L. T. 875. (*d*) Order LIX. r. 10.

(*e*) Order LVIII. r. 13, which provides the contrary is impliedly repealed by sect. 121 of the County Courts Act, 1888 (51 & 52 Vict. c. 43). *McGrath v. Cartwright*, 23 Q. B. D. 3; 58 L. J. Q. B. 331; 60 L. T. 537. (*f*) *Reg. v. Judge of Sheffield County Court*, 5 Times Law Reports, 3. (*g*) Order LIX. rr. 9–17. (*h*) 51 & 52 Vict. c. 43, s. 123.

APPENDIX I.

A TABLE OF SOME OF THE PRINCIPAL TIMES OF PROCEEDINGS.

ACCOUNT UNDER ORDER XV	Application may be made in default of appearance, or at any time after appearance, writ being indorsed with claim for an account.
ADMISSIONS OF FACT, NOTICE FOR	May be given any time not later than 9 days before trial; admissions should be made within 6 days of such notice.
AFFIDAVITS	When evidence by consent to be by affidavits, plaintiff's affidavits must be filed within 14 days after consent; defendant's affidavits within 14 days of delivery of list of plaintiff's affidavits and plaintiff's affidavits in reply within 7 days of expiration of the time for defendant's affidavits. Notice for cross-examination when evidence taken by affidavit, must be served within 14 days after time for filing affidavits in reply. 2 days' notice of intention to read affidavits filed in another action necessary.
AMENDMENT	Writ of summons may be amended at any time by leave. (As to when pleadings may be amended without leave, see <i>ante</i> , p. 87.) When an order is obtained for leave to amend-amendments must be made within 14 days if no time named.
ANSWER TO INTERROGATORIES :	<i>See</i> DISCOVERY.
APPEAL	From a District Registrar to a Judge within 6 days. From a Master to a Judge within 4 days. From a Judge in Chambers to a Divisional Court within 8 days. From a Judge in Chambers to Court of Appeal within 14 days. To Court of Appeal from interlocutory orders, or from any order not in an action, within 14 days; but Bankruptcy and Winding-up Appeals still within 21 days. From summons to vary heard with further consideration, within same time as allowed for appeal from the order on further consideration. To Court of Appeal from an <i>ex parte</i> application within 4 days. To Court of Appeal in other cases within 3 months.

APPEAL—*continued.*

Notice of, **14** days if appeal from a judgment, but if from an interlocutory order **4** days.

Must be set down within time named in notice of appeal.

Notice of, by a respondent in an existing appeal **8** days, if appeal from a judgment, but if from interlocutory order **2** days.

To House of Lords within **1** year, but in case of disability, within **1** year of disability ceasing, and in case of absence within **5** years at utmost.

From County Court: By notice of motion within **21** days. It is an **8** days' notice.

APPEARANCE To writ of summons, or originating summons, if defendant within jurisdiction, within **8** days after service—if not within it, then within time fixed by order.

Defendant may appear though time expired, provided judgment not signed.

Notice of and service of duplicate sealed memorandum, must be effected on day of appearance, or sent by post that day.

When a notice given to a third party (see *ante*, pp. 34, 35), if he wishes to dispute claim, he must appear within **8** days.

ARBITRATION Motion to set aside award of arbitrator must be made before the last day of the sittings next after the award has been made and published.

ARREST Where order made for, and security intended to be given by bond with sureties, objections to proposed sureties must be made within **4** days after receiving particulars.

BILL OF SALE With affidavit must be filed in Central Office within **7** days after execution.

CERTIFICATE OF MASTER
IN THE CHANCERY
DIVISION

Opinion of Judge on any point arising on, may be taken at any time during proceedings.

Application to vary, within **8** clear days from filing, except certificates to be acted on at Paymaster's Office without further order, or certificates on passing receiver's accounts when **2** clear days.

CLAIM, STATEMENT OF No further statement of claim allowed where writ specially indorsed.

Cannot be delivered after **6** weeks from appearance.

Where defendant gives notice requiring statement of claim, which he may do on appearing, or within **8** days therefrom, it must be delivered within **5** weeks from such notice. (This is subject to plaintiff having given notice of intention to proceed to trial without pleadings, *ante*, p. 70.)

COMMITMENT Order of, under Debtors' Act, 1869, remains in force for **1** year, but may be renewed.

CONCURRENT WRITS May be issued at any time whilst original writ remains in force.

COSTS	Judgment for, after discontinuance, may be signed if not paid within 4 days after taxation. To review taxation objections must be carried in before certificate or allocatur signed, and then within 14 days of certificate or allocatur summons to review taken out.
CROSS EXAMINATION	Notice for, must be served within 14 days after time for filing affidavits in reply.
COUNTER-CLAIM . .	To be put in with statement of defence, or if action proceeding without pleadings, notice thereof to be given within 10 days of appearance.
COUNTY COURT . .	Appeal from, by notice of motion within 21 days of decision.
DEFENCE, STATEMENT OF . .	Must be delivered within 10 days from delivery of statement of claim, or time limited for appearance whichever last. Where no statement of claim delivered or required, must be delivered within 10 days of appearance. When leave to defend given under Order XIV., then within time named in order, or if no time named, within 8 days after order. Where further defence or reply arises during action and after defence put in, leave to set it up must be obtained within 8 days of its so arising.
DIRECTIONS, SUMMONS FOR	May be taken out in the Queen's Bench Division at any time by any party: 4 days between service and return.
DISCONTINUANCE . . .	Any time before taking any step in action after defence other than an interlocutory application, after that only by leave. Judgment for costs on, may be signed 4 days after taxation if not paid.
DISCOVERY	Interrogatories may be delivered only by leave. Application to strike out any interrogatories must be made within 7 days of their delivery. Affidavit answering interrogatories to be filed within 10 days. When notice given to produce certain documents for inspection in the course of the action, the party receiving such notice must within 2 days, if all documents referred to therein have been set out in his affidavit of documents, or if not then within 4 days, give notice to the opposite party stating a time within 3 days from delivery of such notice, at which the documents can be inspected by him.
DISMISSAL FOR WANT OF PROSECUTION ALLOWED IN FOLLOWING CASES . .	If statement of claim when required is not delivered within the time allowed. If notice of trial not given within the 6 weeks allowed from the close of the pleadings. If default made in obeying an order for discovery or inspection.

- DISTRICT REGISTRY** When action may be removed from, as a matter of right (see *ante*, pp. 116, 117).
- DISTRINGAS PROCESS** Affidavit and notice only have effect for **8** days from application to deal with fund.
- EJECTMENT** In an action for recovery of land, defence may be limited to a part, by serving notice to that effect within **4** days after appearance.
- ENTRY OF CAUSE FOR TRIAL** : See **TRIAL**.
- EXECUTION** May generally issue immediately after final judgment, but on a judgment, not being for money or land, after **14** days.
 Writ of, in force for **1** year, but may be renewed for further period of **1** year, and so on from time to time.
 After **6** years from date of judgment, or after change of parties and in some other cases, leave must be given to issue. After **12** years no leave can be given.
 Also leave must be obtained to issue it on judgment *quando acciderint*.
- FURTHER CONSIDERATION** Cause cannot except by consent be put in paper for hearing until after **10** days from setting down, and **6** days' notice of its having been set down must be given.
- GUARDIAN** Notice of application for a guardian *ad litem* to be appointed to a defendant who has not appeared, must be served **6** clear days before day of hearing.
- INSPECTION** : See **DISCOVERY** Under notice to inspect and admit documents, party should admit within **48** hours.
- INTERROGATORIES** : See **DISCOVERY**.
- JOINDER OF ISSUE** If not delivered with reply, within **4** days after delivery of previous pleading.
- JUDGMENT** In case of summons for, under Order XIV. there must be **4** days between service and return.
 Final judgment by default may be issued at expiration of time limited for appearance, if writ indorsed for liquidated amount; but if writ for unliquidated damages, then only interlocutory judgment.
 Final judgment may be signed in default of statement of defence if claim for a fixed liquidated amount, but if for unliquidated damages, then only interlocutory judgment.
 Where party does not appear at trial, and judgment goes against him, application to set it aside must be made within **6** days.
- JURY** : See also **TRIAL** Special, notice for, to defendant, same as notice of trial.
 Special, notice for to plaintiff, **6** days before day for which notice of trial given.

LIMITATION OF ACTIONS

Actions must be brought within the following periods respectively:—

Adwosons, to recover, **3** adverse incumbencies, or **40** years, or at the utmost within **100** years.

Assault, **4** years.

Assumpsit, **6** years.

Covenant, **20** years.

False imprisonment, **4** years.

Intestacies, share in personalty under, **20** years.

Justices, actions against, in respect of official acts, **6** calendar months.

Land, recovery of, **12** years : but if disability, **6** years from ceasing, the extreme period being **30** years.

Legacy, **12** years.

Libel, **6** years.

Mortgage of land under seal, **12** years, but of personalty, **20** years.

Slander, **2** years.

Trespass to land or goods, **6** years.

Trespass to the person, **4** years.

Under Lord Campbell's Act (9 & 10 Vict. c. 93) within 1 year of death ; if not brought within first **6** months by executor or administrator, person beneficially interested may bring action within remaining **6** months.

Under Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), notice must be given within **6** weeks of injury, and action brought within **6** months of injury, or if death ensue, within **12** months of death.

MOTION, NOTICE OF . . **2** clear days required.

NEW TRIAL : *See TRIAL.*

NOTICE After no proceeding in an action for a year, **1** month's notice necessary.

Of trial, given with or after reply, **10** days, long ; **4** days, short ; if no pleadings, **21** days' notice of trial within **10** days of appearance.

By defendant requiring a jury where he has a right to it, within **4** days of receipt of notice of trial.

For special jury, to defendant, same as notice of trial.

For special jury, to plaintiff, **6** days before day for which notice of trial given.

Of motion, **2** days, but if to answer matters on affidavit, or strike solicitor off rolls, **10** days.

Of taxing costs, **1** day.

ORDER **1** day's notice of appointment to settle.

ORIGINATING SUMMONS _ Time to appear, **8** days.

PARTICULARS IN MITIGATION OF DAMAGES, &c., IN LIBEL OR SLANDER	Must be given 7 days before the trial.
PAYMENT INTO COURT	May be made by defendant immediately on being served with writ, or up to delivering his defence; afterwards only by leave. Plaintiff may, where liability not denied, within 4 days after notice of payment in, or if payment in is stated in defence, then before reply, accept such payment in satisfaction. If he does this, he gives notice thereof, and taxes his costs; and if not paid within 48 hours he may sign judgment for them.
PETITION	2 clear days between service and hearing.
PLEADING: <i>See</i> DIFFERENT TITLES	Where pleading amended, opposite party may within the time he then has to plead, or within 8 days from the delivery of the amendment, whichever shall last happen, put in an amended pleading. Where particulars ordered, same time allowed for pleading after delivery, as party had at time of return of summons.
PROCEED, SUMMONS TO	If not taken out by plaintiff within 10 days of passing and entering judgment, may be taken out by any other party.
REPLEVIN	In superior Court, bond conditioned to commence action within 1 week. In County Court, within 1 month.
REPLY	Must be delivered within 21 days from defence. Further reply arising pending action, within 8 days after its arising.
REJOINDER	Within 4 days of previous pleading, and only allowed without leave if it simply contains joinder of issue.
SECURITY: <i>See</i> ARREST	Summons for security for costs should be taken out before issue joined.
SERVICE OF PLEADINGS, &c.	Before 6 P.M., and on Saturdays before 2 P.M.
SERVICE OF WRIT	Memorandum of, must be indorsed within 3 days after service.
SOLICITORS	Notice of motion to strike solicitor off rolls, or to answer matters on affidavit, must be served 10 days before time named for motion.
STATEMENT: <i>See</i> CLAIM; DEFENCE: REPLY.	
SUBPŒNA	Service of, must be within 12 weeks of issue. It only remains in force till the end of the sitting or assize for which it is issued.
SUMMONS	Time to appear to writ of, or originating summons, 8 days. Ordinarily interlocutory summonses must be served 2 clear days before return, but summonses under Order XIV., and summonses for directions, 4 clear days before return, and summonses for time 1 day returnable for next day.

- TIME, COMPUTING** Where time allowed is not clear days, the first day not included, but the last is.
 Sunday, Christmas Day, and Good Friday not reckoned in periods of less than 6 days.
- TRIAL** Notice of, 10 days, but if under terms to take short notice, then 4 days. If notice given of intention to proceed without pleadings, 21 days' notice within 10 days of appearance.
 Place of, where no statement of claim, may be stated in notice delivered by plaintiff within 6 days of appearance.
 When there are pleadings, notice of, to be given with reply, or at any time after issues of fact ready for trial; but if plaintiff does not give notice of trial within 6 weeks from close of pleadings, defendant may do so, or apply to dismiss action.
 Plaintiff in notice states mode of trial, but if otherwise than by jury, in cases in which a right to a jury still exists, defendant may, within 4 days of service of the notice of trial, give a notice that he requires a jury.
 Summons for a jury in other cases must be taken out within 10 days of service of notice of trial.
 In London or Middlesex plaintiff may enter cause for trial same day as notice of trial given, or next day; either party within 4 subsequent days; and if not entered by either party within 6 days notice of trial falls through.
 In trials at Assizes either party may, not less than 7 days before the Commission day, enter cause for trial with District Registrar or Associate. Entry after this only by special leave.
 14 days' notice of motion for new trial.
 Notice of motion for new trial to be served within times following:—viz., if the trial has taken place in London or Middlesex within 8 days after the trial; if it has taken place elsewhere, within 7 days after the last day of sittings on the circuits; the time of the vacations not reckoned in the computation of the time for serving the notice of motion.
 When verdict or judgment obtained by reason of non-appearance of party, application to set it aside to be made within 6 days after trial.
- VACATIONS** Long Vacation from 13th August to 23rd October.
- WRIT OF EXECUTION** : *See* EXECUTION.
- WRIT OF SUMMONS** Remains in force for 12 months, but may be renewed for 6 months, and so on from time to time, on showing that reasonable efforts have been made to effect service, or for other good reason.
 Concurrent, may be issued at any time during currency of original writ.
 Service of, to be indorsed within 3 days thereafter.

This writ was issued by the said plaintiff, who resides at _____, or, this writ was issued by *E.F.*, of _____, and whose address for service is _____, solicitor for the said plaintiff, who resides at _____ or, this writ was issued by *G.H.*, of _____, whose address for service is _____, agent for _____ of _____, solicitor for the said

plaintiff, who resides at [mention the city, town, or parish, and also the name of the street and number of the house of the plaintiff's residence.]

Indorsement to be made on the writ after service thereof.

This writ was served by me at _____ on the defendant,
on the _____ day of _____

18 .
Indorsed the _____ day of _____ 18

(Signed)

(Address)

(2) FORM OF SPECIALLY INDORSED WRIT, UNDER
ORDER III., RULE 6 (*ante*, pp. 45, 46).

18 . [*Here put the letter and number.*]

IN THE HIGH COURT OF JUSTICE.

— Division.

Between A.B. Plaintiff
and
C.D. Defendant.

VICTORIA, by the Grace of God, &c., to C.D., of _____ in the
county of _____

WE COMMAND YOU, that within eight days after the service of this writ on you, inclusive of the day of such service, you cause an appearance to be entered for you in an action at the suit of

And take notice, that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence.

Witness, Harding Stanley Baron Halsbury, Lord High Chancellor of Great Britain, the _____ day of _____ in the year of our Lord One thousand eight hundred and ninety-_____.

N.B.—This writ is to be served within twelve calendar months from the date thereof, or, if renewed, within six calendar months from the date of the last renewal, including the day of such date, and not afterwards.

The defendant [*or defendants*] may appear hereto by entering the appearance [*or appearances*] either personally or by solicitor at the Central Office, Royal Courts of Justice, London.

Indorsements :

STATEMENT OF CLAIM.

The plaintiff's claim is

PARTICULARS.

Place of Trial,

(Signed)

And the sum of £ _____ [*or such sum as may be allowed on taxation*] for costs. If the amount claimed is paid to the plaintiff, or his solicitor or agent, within four days from the service hereof, further proceedings will be stayed.

This writ was issued by the said plaintiff, who resides at
 [or] this writ was issued by *E.F.*, of
 whose address for service is _____, solicitor for the said plaintiff,
 who resides at _____, [or] this writ was issued by *G.H.*, of
 whose address for service is _____, agent for _____ of
 solicitor for the said plaintiff, who resides at _____

This writ was served by me at _____ on the defendant
 on _____ the _____ day of _____ 18 .

Indorsed the _____ day of _____ 18 .

(Signed)

(Address)

(3) FORM OF ORDINARY STATEMENT OF CLAIM IN ACTION
 IN QUEEN'S BENCH DIVISION (*ante*, p. 75).

18 . [*Here put the letter and number.*]

IN THE HIGH COURT OF JUSTICE.

Queen's Bench Division.

Writ issued the _____ day of _____ 18 .

Between *A.B.* Plaintiff

and

C.D. Defendant.

STATEMENT OF CLAIM.

The plaintiff's claim is for £64 15s. 0d., the price of goods sold, and delivered.

PARTICULARS.

1887—31st December.—

	£	s.	d.
Balance of account for Butcher's meat to this date . . .	35	10	0
1888—1st January to 31st March—			

Butcher's meat	74	5	0
--------------------------	----	---	---

109 15 0

1888—1st February.—Paid	45	0	0
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Balance due	£64	15	0
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Place of trial, [_____]

(Signed)

DELIVERED THE

DAY OF _____ 18 .

BY

PLAINTIFF'S SOLICITOR.

(4) FORM OF ORDINARY STATEMENT OF DEFENCE IN ACTION
IN QUEEN'S BENCH DIVISION (*ante*, p. 78).

18 . [*Here put the letter and number.*]

IN THE HIGH COURT OF JUSTICE.

Queen's Bench Division.

Writ issued the day of 18 .
Between *A.B.* Plaintiff
and
C.D. Defendant.

STATEMENT OF DEFENCE.

1. The defendant did not order the goods.
2. The goods were not delivered to the defendant.

(Signed)

DELIVERED THE DAY OF 18 .
BY DEFENDANT'S SOLICITOR.

(5) FORM OF ORDINARY REPLY IN ACTION IN QUEEN'S
BENCH DIVISION (*ante*, p. 83).†

18 . [*Here put the letter and number.*]

IN THE HIGH COURT OF JUSTICE.

Queen's Bench Division.

Writ issued the day of 18 .
Between *A.B.* Plaintiff
and
C.D. Defendant.

REPLY.

The plaintiff as to the defence says that—
He joins issue.

(Signed)

DELIVERED THE DAY OF 18
BY PLAINTIFF'S SOLICITOR.

(6) FORM OF NOTICE TO ADMIT FACTS (*ante*, p. 89).18 . [*Here put the letter and number.*]

IN THE HIGH COURT OF JUSTICE.

— Division

Between *A.B.* Plaintiff
and
C.D. Defendant.

TAKE NOTICE, that the plaintiff [*or defendant*] in this cause requires the defendant [*or plaintiff*] to admit, for the purposes of this cause only, the several facts respectively hereunder specified; and the defendant [*or plaintiff*] is hereby required, within six days from the service of this notice to admit the said several facts, saving all just exceptions to the admissibility of such facts as evidence in this cause.

Dated, &c.

E.F., Solicitor [*or agent*] for the plaintiff [*or defendant*].To *G.H.*, Solicitor [*or agent*] for the defendant [*or plaintiff*].

The facts, the admission of which is required, are—

1. That John Smith died on the 1st of January, 1870.
2. That he died intestate.
3. That James Smith was his only lawful son.
4. That Julius Smith died on the 1st of April, 1876.
5. That Julius Smith was never married.

(7) FORM OF NOTICE OF ADMISSION OF FACTS (*ante*, p. 89).18 . [*Here put the letter and number.*]

IN THE HIGH COURT OF JUSTICE.

— Division.

Between *A.B.* Plaintiff
and
C.D. Defendant.

The defendant [*or plaintiff*] in this cause, for the purposes of this cause only, hereby admits the several facts respectively hereunder specified, subject to the qualifications or limitations, if any, hereunder specified, saving all just exceptions to the admissibility of such facts, or any of them, as evidence in this cause.

Provided that this admission is made for the purposes of this action only, and is not an admission to be used against the defendant [*or plaintiff*] on any other occasion, or by any one other than the plaintiff [*or defendant or party requiring the admission.*]

Delivered, &c.

G.H., Solicitor [*or agent*] for the defendant [*or plaintiff*].To *E.F.*, Solicitor [*or agent*] for the plaintiff [*or defendant*].

Facts admitted.	Qualifications or Limitations, if any, subject to which they are admitted.
1. That John Smith died on the 1st of January 1870.	1.
2. That he died intestate.	2.
3. That James Smith was his lawful son.	3. But not that he was his only lawful son.
4. That Julius Smith died.	4. But not that he died on the 1st of April 1876.
5. That Julius Smith never was married.	5.

(8) FORM OF SUMMONS FOR DIRECTIONS PURSUANT TO
ORDER XXX. (*ante*, p. 94)

18 . [*Here put the letter and number.*]

IN THE HIGH COURT OF JUSTICE.

— Division.

Between *A.B.* Plaintiff
and
C.D. Defendant.

Let all the parties concerned attend Master () in Chambers at the Central Office, Royal Courts of Justice, Strand, London, on the day of 18 at o'clock in the noon, on the hearing of an application on the part of to show cause why an order for directions should not be made in this action as follows [*here follow particulars of the various matters in respect of which directions are required.*]

Dated the day of

This summons was taken out by
solicitor for

To

(9) FORM OF ORDER FOR DIRECTIONS PURSUANT TO
ORDER XXX. (*ante*, p. 94).

18 . [*Here put the letter and number.*]

IN THE HIGH COURT OF JUSTICE.

— Division.

Between *A.B.* Plaintiff
and
C.D. Defendant.

Upon hearing *the solicitors on both sides*
and upon reading *the affidavit of*
filed herein
the following directions are hereby given [*the following according to circumstances*]:

Pleadings.

None.

Particulars.

Defendant in a week to give particulars of payment by him to the deceased.

Admissions.	<i>That the plaintiff is executor, and that the goods were supplied by deceased to the defendant.</i>
Discovery.	<i>Defendant in a week to produce letter of 1st January 1889.</i>
Interrogatories.	<i>Plaintiff may interrogate as to payment only: interrogatories to be initialled by the Master.</i>
Inspection of documents.	<i>Plaintiff undertakes to produce pass book of deceased at trial.</i>
Inspection of real or personal property.	<i>None.</i>
Commissions.	<i>None.</i>
Examination of witnesses.	<i>John Smith to be examined at Cardiff within a fortnight before examiner of the court or special examiner to be named by parties, or in default by the Master.</i>
Place of trial.	<i>Swansea.</i>
Mode of trial.	<i>Judge.</i>
Any other interlocutory matter or thing.	<i>Notice of trial to be given at once by plaintiff.</i>

(10) FORM OF AFFIDAVIT OF DOCUMENTS (*ante*, p. 105).18 . [*Here put the letter and number.*]

IN THE HIGH COURT OF JUSTICE.

— Division.

Between *A.B.* Plaintiff
and
C.D. Defendant

I, the above-named defendant *C.D.* make oath and say as follows:—

1. I have in my possession or power the documents relating to the matters in question in this suit set forth in the first and second parts of the first schedule hereto.

2. I object to produce the said documents set forth in the second part of the said first schedule hereto.

3. That [*here state upon what grounds the objection is made, and verify the facts as far as may be*].

4. I have had, but have not now, in my possession or power the documents relating to the matters in question in this suit set forth in the second schedule hereto.

5. The last-mentioned documents were last in my possession or power on [*state when*].

6. That [*here state what has become of the last-mentioned documents, and in whose possession they now are*].

7. According to the best of my knowledge, information, and belief, I have not now, and never had in my possession, custody, or power, or in the possession, custody, or power of my solicitors or agents, solicitor or agent, or in the possession, custody, or power of any other persons or person on my behalf, any deed, account, book of account, voucher, receipt, letter,

memorandum, paper, or writing, or any copy of or extract from any such document, or any other document whatsoever, relating to the matters in question in this suit, or any of them, or wherein any entry has been made relative to such matters, or any of them, other than and except the documents set forth in the said first and second schedules hereto.

[*Here follow the Schedules.*]

(11) FORM OF NOTICE TO PRODUCE DOCUMENTS FOR
INSPECTION (*ante*, p. 107).

18 . [*Here put the letter and number.*]

IN THE HIGH COURT OF JUSTICE.

— Division.

Between *A.B.* Plaintiff
and
C.D. Defendant.

TAKE NOTICE that the [*plaintiff or defendant*] requires you to produce for his inspection the following documents referred to in your [*statement of claim, or defence, or affidavit, dated the* day of].

(*Describe documents required to be produced.*)

X.Y.,
Solicitor to the

To

Solicitor for

(12) FORM OF NOTICE OF APPOINTMENT TO INSPECT
DOCUMENTS (*ante*, p. 107).

18 . [*Here put the letter and number.*]

IN THE HIGH COURT OF JUSTICE.

— Division.

Between *A.B.* Plaintiff
and
C.D. Defendant.

TAKE NOTICE that you can inspect the documents mentioned in your notice of the day of [*except the deed numbered in that notice*] at [*insert place of inspection*] on next the inst., between the hours of 12 and 4 o'clock.

Or, that the [*plaintiff or defendant*] objects to giving you inspection of the documents mentioned in your notice of the day of 18 , on the ground that [*state the ground*]:—

X X
Solicitor to the

To

Solicitor for

(13) NOTICE OF TRIAL (*ante*, p. 132).18 . [*Here put the letter and number.*]

IN THE HIGH COURT OF JUSTICE.

— Division.

Between A.B. Plaintiff

and

C.D. Defendant.

TAKE NOTICE of trial of this action* [*or of the issues in this action ordered to be tried*] by a judge and jury [*or as the case may be*] in [or as the case may be] for the day of next.

Dated 18 . E.F., PLAINTIFF'S SOLICITOR.

To G.H., DEFENDANT'S SOLICITOR [*or agent*].

(14) FORM OF NOTICE TO PRODUCE DOCUMENTS AT TRIAL

(*ante*, p. 137).18 . [*Here put the letter and number.*]

IN THE HIGH COURT OF JUSTICE.

— Division.

Between A.B. Plaintiff

and

C.D. Defendant.

TAKE NOTICE that you are hereby required to produce and show to the Court on the trial of this action, all books, papers, letters, copies of letters, and other writings and documents in your custody, possession, or power, containing any entry, memorandum, or minute relating to the matters in question in this action and particularly (*here specify any particular documents*).

Dated the day of 18 .

To the above-named

h solicitor

or agent

(Signed)
 of
 agent for
 solicitor for the above-named

(15) FORM OF NOTICE TO INSPECT AND ADMIT DOCUMENTS

(*ante*, p. 137).18 . [*Here put the letter and number.*]

IN THE HIGH COURT OF JUSTICE.

— Division.

Between A.B. Plaintiff

and

C.D. Defendant.

TAKE NOTICE that the plaintiff [*or defendant*] in this cause proposes to

* If it is intended to proceed to trial without pleadings (*ante*, p. 70), add the words "without pleadings."

adduce in evidence the several documents hereunder specified, and that the same may be inspected by the defendant [or plaintiff] his solicitor or agent, at _____ on _____ between the hours of _____ ; and the defendant [or plaintiff] is hereby required, within forty-eight hours from the last-mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written, signed, or executed, as they purport respectively to have been ; that such as are specified as copies are true copies ; and such documents as are stated to have been served, sent, or delivered, were so served, sent, or delivered respectively ; saving all just exceptions to the admissibility of all such documents as evidence in this cause.

Dated, &c.

(Signed)
G.H., Solicitor [or agent] for
defendant [or plaintiff].

To E.F., Solicitor [or agent] for plaintiff [or defendant].

[Here describe the documents, the manner of doing which may be as follows :—]

ORIGINALS.

Description of Documents.	Dates.
Deed of covenant between A.B. and C.D. first part, and E.F. second part	January 1, 1848.
Indenture of lease from A.B. to C.D.	February 1, 1848.
Indenture of release between A.B., C.D., first part, &c.	February 2, 1848.
Letter, defendant to plaintiff	March 1, 1848.
Policy of Insurance on goods by ship "Isabella" on voyage from Oporto to London	December 3, 1847.
Memorandum of agreement between C.D., captain of said ship, and E.F.	January 1, 1848.
Bill of exchange for £100 at three months, drawn by A.B. on and accepted by C.D., indorsed by E.F. and G.H.,	May 1, 1819.

COPIES.

Description of Documents.	Dates.	Original or Duplicate served, sent, or delivered when, how, and by whom.
Register of baptism of A.B. in the parish of X.	January 1, 1848 .	Sent by General Post February 2, 1848. Served March 2, 1897, on defendant's attorney by E.F., of —
Letter—plaintiff to defendant	February 1, 1848 .	
Notice to produce papers	March 1, 1897 .	
Record of a Judgment of the Court of Queen's Bench in an action, F.S. v. F.N.	Trinity Term, 10th Vict.	
Letters Patent of King Charles II. in the Rolls Chapel	January 1, 1680 .	

(16) PRECEDENT OF PLAINTIFF'S ORDINARY COSTS OF AN ACTION IN THE QUEEN'S BENCH DIVISION (*ante*, p. 181).

IN THE HIGH COURT OF JUSTICE.

18 .—B.—No.

Queen's Bench Division.

Between *A.B.* Plaintiff
and
C.D. Defendant.

PLAINTIFF'S COSTS.

Trinity Sittings, 1888.

1888.	£	s.	d.
June 8.—Letter before action	0	3	6
11.—Instructions to sue	0	6	8
Writ of summons and copy to file and attending to issue	0	6	8
Instructions for statement of claim	0	13	4
Special indorsement	0	5	0
Paid issuing	0	10	0
Copy for service	0	1	0
Service thereof	0	5	0
19.—Attending searching for appearance	0	3	4
Paid	0	1	0
20.—Paid for summons for leave to sign judgment, under Order XIV., copy and service	0	10	6
Instructions for affidavit in support	0	6	8
Drawing same, folios 6	0	6	0
Engrossing	0	2	0
Attending deponent to be sworn	0	6	8
Paid oath	0	1	6
Paid filing	0	2	6
Copy for defendant's solicitors	0	2	0
24.—Perusing affidavit in opposition to summons, folios 8	0	2	8
Attending summons when liberty to defend given	0	6	8
Paid for order, copy and service	0	8	6
July 6.—Attending defendant giving consent to seven days' further time to defend	0	6	8
10.—Perusing statement of defence	0	6	8
13.—Paid for summons for leave to administer interro- gatories, copy and service	0	10	6
16.—Attending summons, order made	0	6	8
Paid for order, copy and service	0	8	6
Instructions for interrogatories	0	6	8
Drawing same, folios 5	0	5	0
Paid fee to counsel to settle	1	3	6
Attending him	0	3	4
Drawing request to pay money into Court	0	2	6
Paid for request	0	1	0
Attending paying deposit into Court	0	6	8
Paid	5	0	0
Copy interrogatories for service	0	1	8
Service thereof	0	2	6

	£	s.	d.
July 16.—Copy receipt for deposit for service	0	1	0
July 20.—Perusing affidavit in answer to interrogatories, fol. 10	0	3	4
Demand for prints	0	4	0
Paid for six prints	0	2	11
Attending searching and found affidavit filed	0	3	4
Paid for summons for discovery of documents by defendant, copy and service	0	10	6
Drawing request to pay deposit into Court	0	2	6
Paid for request	0	1	0
Attending paying deposit into Court	0	6	8
Paid deposit	5	0	0
Copy receipt for service	0	1	0
23.—Attending summons, order made	0	6	8
Paid for order, copy and service	0	8	6
27.—Attending searching and found affidavit filed	0	3	4
Demand for copy	0	4	0
Paid for copy affidavit, folios 10	0	3	4
Perusing same	0	3	4
Notice to inspect documents disclosed by affidavit, copy and service	0	4	0
29.—Attending inspecting	0	6	8
30.—Instructions for reply	0	6	8
Drawing same	0	5	0
Paid fee to counsel to settle	1	3	6
Attending him	0	3	4
Copy for service, folio 3	0	1	0
Attending to deliver	0	3	4
Notice of trial, copy, and service	0	4	0
2 copies writ with statement of claim thereon on entering action for trial	0	2	0
2 copies statement of defence, folios 5 each	0	3	4
2 copies reply, folios 3 each	0	2	0
2 copies notice of trial	0	2	0
31.—Attending to enter cause for trial	0	6	8
Paid	2	0	0
Instructions to counsel to advise on evidence	0	13	4
Paid fee to counsel	2	4	6
Attending him	0	6	8
Aug. 1.—Notice to produce documents	0	5	0
Service	0	2	6
Affidavit of service	0	5	0
Copy notice to annex, folios 3	0	1	0
Marking same as exhibit	0	1	0
Paid oath and exhibit	0	2	6
Notice to inspect and admit documents	0	5	0
Service	0	2	6
Attending giving inspection of documents	0	6	8
Perusing defendant's notice to produce	0	6	8

	£	s.	d.
Aug. 1.—The like to inspect and admit.	0	6	8
Attending inspecting documents	0	6	8
Attending signing admission of documents	0	6	8
Preparing subpoena <i>ad test</i> , and attending to issue	0	6	8
Paid	0	5	0
Copy for service	0	1	0
Service thereof	0	5	0
Preparing subpoena <i>duces tecum</i> and attending to issue	0	6	8
Paid	0	5	0
Copy for service	0	1	0
Service thereof	0	5	0
Attending witness, arranging for his attendance without subpoena	0	3	4
Attending plaintiff, informing him his evidence would be required on the trial	0	3	4
Instructions for brief	5	5	0
Drawing same, folios 40	2	0	0
Fair copy	0	13	4
Copy of writ with statement of claim thereon	0	1	0
Copy of other pleadings and notice of trial, folios 11	0	3	8
Copy interrogatories for counsel, folios 5	0	1	8
Print of answer to interrogatories, folios 10	0	1	8
Copy plaintiff's notice to produce, folios 3	0	1	0
Copy plaintiff's notice to inspect and admit, folios 3	0	1	0
Copy defendant's notice to produce, folios 3	0	1	0
Copy, defendant's notice to inspect and admit, folio 3	0	1	0
Paid fee to counsel	5	10	0
Attending him	0	6	8
Paid conference fee to counsel	1	6	0
Attending to appoint same	0	3	4
6.—Writing four witnesses to attend Court	0	8	0
7.—Attending conference	0	13	4
Attending Court cause in paper but not reached	0	10	0
8.—Attending Court when judgment given for plaintiff	1	1	0
Attendances searching list	0	13	4
10.—Attending for certificate of result of trial	0	3	4
Paid	1	0	0
Drawing judgment	0	3	4
Attending to enter	0	6	8
Copy for office copy	0	1	0
Paid and for office copy	1	0	6
Drawing request to get money out of Court paid in as security and attending getting Master's signature	0	3	0
Attending bespeaking cheque and afterwards for same	0	10	0

	£	s.	d.
Aug. 10.—Drawing bill of costs and copy for taxation, folio 14	0	9	4
Copy for defendant's solicitor	0	4	8
Attending obtaining appointment to tax	0	3	4
Notice to tax, copy, and service	0	4	0
Attending taxing	0	6	8
Sittings fee	0	15	0

Paid witnesses as follows :

Mr. A., of	Clerk, 2 days
Mr. B., of	Builder, 2 days
Mr. C., of	Gentleman, 2 days

Taxed off

Paid Taxing fees

£

(17) PRECEDENT OF DEFENDANT'S ORDINARY COSTS OF AN ACTION IN THE QUEEN'S BENCH DIVISION (*ante*, p. 181).

IN THE HIGH COURT OF JUSTICE.

18 .—B.—No.

Queen's Bench Division.

Between *A.B.* Plaintiff

and

C.D. Defendant.

DEFENDANT'S COSTS.

Trinity Sittings, 1888.

	£	s.	d.
1888.			
June 19.—Instructions to defend	0	6	8
Attending to give undertaking to appear	0	6	8
Perusing statement of claim on writ	0	6	8
Entering appearance	0	6	8
Paid	0	2	0
Notice, copy and service	0	4	0
20.—Perusing affidavit in support of summons for judgment, folios 6	0	2	0
Instructions for affidavit in opposition	0	6	8
Drawing same, folios 8	0	8	0
Engrossing	0	2	8
Attending deponent to be sworn	0	6	8
Paid oath	0	1	6
Paid filing	0	2	6
Copy affidavit for plaintiff's solicitor	0	2	8
24.—Attending summons when liberty given to defend	0	6	8
July 6.—Attending obtaining consent for further time to deliver statement of defence	0	6	8
Instructions for statement of defence	0		6
Drawing same, folios 15	0	15	0
Paid fee to counsel to settle	1	3	6
Attending him	0	3	4

	£	s.	d.
July 10.—Copy to deliver	0	1	8
Attending to deliver	0	3	4
16.—Attending plaintiff's summons for leave to administer interrogatories, order made	0	6	8
Perusing interrogatories	0	6	8
18.—Instructions for affidavit in answer	0	6	8
Drawing same, folios 10	0	10	0
Paid fee to counsel to settle	1	3	6
Attending him	0	3	4
Copy for printer	0	3	4
Examining proof	0	1	8
Paid printer's bill	0	10	0
19.—Print to be sworn to	0	1	8
Attending deponent to be sworn	0	6	8
Paid oath	0	1	6
Paid filing affidavit	0	2	6
Attending filing	0	3	4
Notice of filing	0	4	0
23.—Attending plaintiff's summons for discovery of documents, order made	0	6	8
26.—Instructions for affidavit of documents	0	6	8
Drawing same, folios 10	0	10	0
Engrossing	0	3	4
Attending deponent to be sworn	0	6	8
Paid oath	0	1	6
Paid filing	0	2	6
Attending filing	0	3	4
Notice of filing	0	4	0
28.—Notice of appointment to inspect documents	0	4	0
29.—Attending giving inspection	0	6	8
30.—Perusing reply	0	6	8
31.—Instructions to counsel to advise on evidence	0	13	4
Paid fee to counsel	2	4	6
Attending him	0	6	8
Aug. 1.—Notice to produce documents	0	5	0
Service	0	2	6
Notice to inspect and admit	0	5	0
Service	0	2	6
Attending giving inspection	0	6	8
Perusing plaintiff's notice to produce	0	6	8
The like to inspect and admit	0	6	8
Attending inspecting documents	0	6	8
Attending obtaining admission of documents	0	6	8
Preparing subpoena <i>ad test</i> and attending to issue	0	6	8
Paid	0	5	0
Copy for service	0	1	0
Service thereof	0	5	0
Instructions for brief	5	5	0
Drawing same, folios 30	1	10	0

	£	s.	d.
Aug. 1.—Fair copy	0	10	0
Copy of writ with statement of claim thereon	0	1	0
Copy of other pleadings and notice of trial, folios 11	0	3	8
Copy interrogatories for counsel, folios 5	0	1	8
Print of answer to interrogatories, folios 10	0	1	8
Copy plaintiff's notice to produce, folios 3	0	1	0
Copy plaintiff's notice to inspect and admit, folios 3	0	1	0
Copy defendant's notice to produce, folios 3	0	1	0
Copy defendant's notice to inspect and admit, folios 3	0	1	0
Paid fee to counsel	5	10	0
Attending him	0	6	8
Paid conference fee to counsel	1	6	0
Attending to appoint same	0	3	4
6.—Writing defendant and witness to attend Court	0	5	0
7.—Attending conference	0	13	4
Attending Court, cause in paper, but not reached	0	10	0
8.—Attending Court when judgment given for plaintiff	1	1	0
Attendances searching list	0	13	4
10.—Attending taxing plaintiff's costs	0	6	8
Sittings fee	0	15	0
<i>Paid Witness :</i>			
Mr. A., of, Merchant, 2 days			

(18) SPECIMEN FORM OF STATEMENT OF CLAIM IN ACTION IN
CHANCERY DIVISION (*ante*, p. 192).

18 . *Here put the letter and number.*]

IN THE HIGH COURT OF JUSTICE.

Chancery Division.

18 .

Mr. Justice

Writ issued

18 .

Between *A.B.* Plaintiff

and

C.D. & E.F. Defendants.

Statement of Claim.

1. The plaintiff is residuary legatee of *A.B.*, of the City of Bath, who died March 3rd, 1882, having made his will dated March 2nd, 1882, and appointed the defendants his executors, who proved his will April 6th, 1882.

2. The defendants have been guilty of wilful default in not getting in certain property of the testator.

3. The wilful default on which the plaintiff relies is as follows:—

C.D. owed to the testator £1000, in respect of which no interest had been paid, or acknowledgment given for five years before the testator's death. The defendants were aware of this fact, but never applied to *C.D.* for payment until more than a year after testator's death, whereby the said sum was lost.

The plaintiff claims :—

- (1) Account of testator's personal estate on footing of wilful default.
- (2) Administration of the testator's personal estate.

(Signed)

DELIVERED THE DAY OF 18 .
BY PLAINTIFF'S SOLICITOR.

(19) SPECIMEN FORM OF STATEMENT OF DEFENCE IN AN
ACTION IN THE CHANCERY DIVISION (*ante*, p. 192).

18 . [*Here put the letter and number.*]

IN THE HIGH COURT OF JUSTICE.

Chancery Division.

Mr. Justice Writ issued 18 .
Between *A.B.* Plaintiff
and
C.D. & E.F. Defendants.

Statement of Defence.

1. The defendants do not admit the plaintiff's claim.
2. The claim is barred by the Statute of Limitations.
3. The defendants have not been guilty of the wilful default alleged in the statement of claim or any other wilful default.

(Signed.)

DELIVERED THE DAY OF 18 .
BY DEFENDANT'S SOLICITOR.

(20) SPECIMEN FORM OF STATEMENT OF REPLY IN AN
ACTION IN THE CHANCERY DIVISION (*ante*, p. 192).

18 . [*Here put the letter and number.*]

IN THE HIGH COURT OF JUSTICE.

Chancery Division.

Mr. Justice Writ issued 18 .
Between *A.B.* Plaintiff
and
C.D. & E.F. Defendants.

REPLY.

The Plaintiff as to the defence says he joins issue.

(Signed)

DELIVERED THE DAY OF 18 .
BY PLAINTIFF'S SOLICITOR.

(21) FORM OF AN ORDINARY ADMINISTRATION JUDGMENT OR ORDER CONTAINING THE MOST USUAL ACCOUNTS AND INQUIRIES IN AN ORDINARY ADMINISTRATION ACTION (*ante*, pp. 198. 203).

THIS COURT doth order that the following accounts and inquiry be taken and made ; that is to say :—

1. An account of the personal estate not specifically bequeathed of deceased, the testator in the pleadings named, come to the hands of
2. An account of the testator's debts.
3. An account of the testator's funeral expenses.
4. An account of the testator's legacies and annuities (if any) given by the testator's will.
5. An inquiry what parts (if any) of the testator's said personal estate are outstanding or undisposed of.

And it is ordered that the testator's personal estate not specifically bequeathed, be applied in payment of his debts and funeral expenses in a due course of administration, and then in payment of the legacies and annuities (if any) given by his will.

If real estate—

And it is ordered that the following further inquiries and account be made and taken ; that is to say :

6. An inquiry what real estate the testator was seised of or entitled to at the time of his death.
7. An account of the rents and profit of the testator's real estate received by, &c.
8. An inquiry what incumbrances (if any) affect the testator's real estate or any and what parts thereof.

If sale directed—

9. An account of what is due to such of the incumbrancers as shall consent to the sale hereinafter directed in respect of their incumbrances.

10. An inquiry what are the priorities of such last-mentioned incumbrances.

And it is ordered that the testator's real estate be sold with the approbation of the judge, &c.

And it is ordered that the further consideration of this cause be adjourned, and any of the parties are to be at liberty to apply as they may be advised.

(22) FORM OF AFFIDAVIT AS TO CLAIMS (*ante*, p. 209).18 . [*Here put the letter and number.*]

IN THE HIGH COURT OF JUSTICE.

Chancery Division.

Mr. Justice

Between *A.B.* Plaintiff

and

C.D. Defendant.

We, *A.B.*, of, &c., the above-named plaintiff [*or defendant, or as may be*] the executor [*or administrator*] of , late of , in the county of , deceased, and *E.F.*, of, &c., solicitor, severally make oath and say as follows :

I, the said *E.F.*, for myself, say as follows :

1. I have in the paper writing now produced, and shewn to me, and marked A., set forth a list of all the claims the particulars of which have been sent in to me by persons claiming to be creditors of the said *A.B.*, deceased, pursuant to the advertisement issued in that behalf, dated the day 18 .

And I, the said *A.B.*, for myself, say as follows :

2. I have examined the particulars of the several claims mentioned in the paper writing now produced and shewn to me, and marked A., and I have compared the same with the books, accounts, and documents of the said *A.B.* [*or as may be, and state any other inquiries or investigations made*], in order to ascertain, so far as I am able, to which of such claims the estate of the said *A.B.* is justly liable.

3. From such examination [*and state any other reasons*] I am of opinion and verily believe, that the estate of said *A.B.* is justly liable to the amount set forth in the sixth column of the first part of the said paper writing marked A., and to the best of my knowledge and belief, such several amounts are justly due from the estate of the said *A.B.*, and proper to be allowed to the respective claimants named in the said schedule.

4. I am of opinion that the estate of the said *A.B.* is not justly liable to the claims set forth in the second part of the said paper writing, marked A., and that the same ought not to be allowed without proof by the respective claimants [*or I am not able to state whether the estate of the said *A.B.* is justly liable to the claims set forth in the second part of the said paper writing, marked A., or whether such claims, or any parts thereof, are proper to be allowed without further evidence*].

5. Except as hereinbefore mentioned, there are not, to the best of my knowledge, information, and belief, any other claims against the estate of the said *A.B.*

Sworn, &c.

(23) FORM OF AFFIDAVIT VERIFYING ACCOUNTS AND ANSWERING USUAL INQUIRIES AS TO REAL AND PERSONAL ESTATE (*ante*, p. 212).

18 . [*Here put the letter and number*].

IN THE HIGH COURT OF JUSTICE.

Chancery Division.

Mr. Justice

In the matter of the estate
of X. Y. Deceased

Between A. B. Plaintiff

and

C. D., E. F. and G. H. Defendants.

We, C. D., of, &c., E. F., of, &c., and G. H., of, &c.,
the above-named defendants, severally make oath and say as follows :

1. We have, according to the best of our knowledge, information, and belief, set forth in Schedule I. hereto a full account and inventory of the personal estate of or to which X. Y., the testator in the judgment [*or order*] dated made in this action [*or matter*] named, who died on the day of , was possessed or entitled at the time of his death, *and not by him specifically bequeathed*.

2. Save what is set forth in the said Schedule I., *and what is by the said testator specifically bequeathed*, the said testator was not to the best of our knowledge, information, or belief, at the time of his death possessed of or entitled to any debt or sum of money due to him from us or any of us on any account whatsoever, nor to any leasehold or other personal estate whatsoever.

3. The said testator's funeral expenses have been paid. The same consist of the items of disbursement numbered and in the account hereinafter referred to [*or if not paid it should be so stated with the amount due and to whom due*].

4. We have in the account marked A., now produced and shewn to us, according to the best of our knowledge, information, and belief, set forth a full account of the personal estate of the said testator, *not by him specifically bequeathed*, which has come to our hands or to the hands of any of us, or to the hands of any person or persons by our order or the order of any of us, or for our use or the use of any of us, with the times when the names of the persons from whom, and on what account the same has been received, and also a like account of the disbursements, allowances, and payments made by us or any of us on account of the said testator's funeral expenses, debts, and personal estate, together with the times when, the names of the person to whom, and the purposes for which the same were disbursed, allowed, or paid.

5. And we, each speaking positively for himself and to the best of his knowledge and belief as to other persons, further say that, except as appears in the said account marked A., we have not, nor has any of us, nor have nor has any other person or persons by our order or the order of any of us, or for our use or the use of any of us, possessed, received, or got in any part of the said testator's personal estate, nor any money in respect thereof, and that the said account marked A. does not contain any item of disbursement, allowance, or payment, other than such as has actually been disbursed, paid, or allowed on the account aforesaid.

6. To the best of our knowledge, information, and belief, the personal estate of the said testator, now outstanding or undisposed of, consists of the particulars set forth in Schedule II. hereto.

7. Save what is set forth in Schedule II., there is not to our knowledge, information, or belief, any part of the said testator's personal estate now outstanding or undisposed of.

8. We have, according to the best of our knowledge, information, and belief, set forth in Schedule III. hereto, the particulars of all the real estate which the said *X.Y.* was seized of or entitled to at the date of his death.

9. Save what is set forth in the said Schedule, the said testator was not, to the best of our knowledge, information, or belief, at the time of his death seized of or entitled to any real estate whatsoever.

10. We have, according to the best of our knowledge, information, and belief, set forth in Schedule IV. hereto the particulars of all the incumbrances affecting the said testator's real estate, and what part thereof such incumbrances respectively affect.

11. We have in the account marked B., now produced and shown to us, according to the best of our knowledge, information, and belief, set forth a full account of all the rents and profits of the said testator's real estate which has come to our hands or to the hands of any of us, or to the hands of any person or persons by our order, or the order of any of us, or for our use, or the use of any of us, and the times when, the names of the persons from whom, on what account, in respect of what part of such estate the same have been received, and the times when the same became due, and also a like account of the disbursements, allowances, and payments made by us, or any or either of us, in respect of the said testator's real estate, or the rents and profits thereof, and the times when, the names of the persons to whom, and the purposes for which, the same were made.

12. And we, each speaking positively for himself, and to the best of his knowledge and belief as to other persons, further say that, except as appears in the said account marked B., we have not, nor has any of us, nor has any other person by our order, or the order of any of us, or for our use, or the use of any of us, possessed, received, or got in any rents or profits of the said testator's real estate, nor any money in respect thereof, and that the said account marked B. does not contain any item of disbursement, payment, or allowance, other than such as has actually been disbursed, paid, or allowed, as above stated.

The FIRST SCHEDULE above referred to.

1. £50 cash in the house.
2. £100 cash at the testator's bankers, Messrs. *A.* and *B.*
3. £1000 Consolidated £3 per cent. annuities, standing in the testator's name.
4. £10 due from John James, for half year's rent of house at _____, to Michaelmas, 1882.
5. £32 6s. 8d. balance remaining due from John Thomas on account of half year's rent of farm at _____, to Michaelmas, 1882.
6. £300, a debt due from Samuel Jones on a bond, with interest from _____, at _____ per cent.

7. A leasehold house situate at _____, held under a lease for a term of _____, which will expire on _____, at a rent of £ _____ a year, underlet to James Evans for a term which will expire on _____, at a rent of £50 a year.

8. £25, half a year's rent due from the said James Evans to _____

The SECOND SCHEDULE referred to.

[The particulars to be set forth in the same manner as above.]

The THIRD SCHEDULE above referred to.

[To contain short particulars of the real estate.]

The FOURTH SCHEDULE above referred to.

[To contain short particulars of the incumbrances, and shewing what part of the above real estate is subject to each.]

(24) GENERAL FORM OF ORIGINATING SUMMONS.

(O. LIV., r. 4B.), (*ante*, p. 264).

18 . [*Here put the letter and number.*]

IN THE HIGH COURT OF JUSTICE.

Division.

[¹]

[²]

Between A.B. Plaintiff,

and

C.D. Defendant.

Let _____ of _____ in the county of _____ within eight days after service of this summons on him, inclusive of the day of such service, cause an appearance to be entered for him to this summons, which is issued upon the application of _____ of _____ in the county of _____ who claims to be [*state the nature of the claim*]. for the determination of the following questions: [*State the questions.*]

Dated the _____

This summons was taken out by _____ solicitor for the above-named _____

The defendant may appear hereto by entering appearance either personally or by solicitor at the Central Office, Royal Courts of Justice.

NOTE.—If the defendant does not enter appearance within the time and at the place above-mentioned, such order will be made and proceedings taken as the Judge may think just and expedient.

[¹] If in the Chancery Division add the name of the Judge to whom the matter is assigned.

[²] If the question to be determined arises in the administration of an estate or a trust entitle also in the matter of the estate or trust.

(25) FORM OF ORIGINATING SUMMONS NOT INTER PARTES.

(O. LIV., r. 4B.), (*ante*, p. 264).18 . [*Here put the letter and number.*]IN THE HIGH COURT OF JUSTICE,
Division[1] If in the
Chancery
Division add
the name of
the Judge to
whom the
matter is
assigned.

[2]

In the matter of the Trusts of the Will of *A.B.* And in
the matter of the Trustee Act, 1893.[*or as the case may be.*]Let
of in the county of
within eight days after service of this summons on him,
inclusive of the day of such service, cause an appearance to
be entered for him to this summons, which is issued upon
the application ofof in the county of
for an order that [*state the object of the application.*]

Dated the

To

This summons was taken out by
of

solicitor for the above named

The respondent may appear hereto by entering appearance
either personally or by solicitor at the Central Office, Royal
Courts of Justice, London.NOTE.—If the respondent does not enter appearance
within the time and at the place above mentioned, such
order will be made and proceedings taken as the Judge may
think just and expedient.(26) FORM OF NOTICE OF APPOINTMENT TO HEAR
ORIGINATING SUMMONS.(O. LIV., r. 4D), (*ante*, p. 265).[*Title, &c., as in Forms Nos. 1A. B.*]To [*insert the name of the defendant or respondent.*] Take notice that
you are required to attend the Judge (*or Master*) in Chambers [*or at the*
Chambers of Mr. Justice] at the Royal Courts of Justice
at o'clock in noon, for the hearing of the originating
summons issued herein on the day of 18
and that if you do not attend in person or by solicitor at the time and
place mentioned, such order will be made and proceedings taken as the
Judge [*or Master*] may think just and expedient.

(Signed)

To

Solicitor for the Plaintiff [*or Applicant*].

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SUPPLEMENT TO
INDERMAUR'S MANUAL OF PRACTICE
(SEVENTH EDITION)

THIS edition of my Practice was published in April 1897 before the present Order XXX. was finally passed, though I was able to give the draft of it. I do not think that Order XXX. necessitates a new edition of the book at present; in fact I think it best that students should read the Practice as it stands and compare and consider Order XXX. In course of time the procedure under Order XXX. will become more settled. In the meantime I feel a brief supplement may prove of much assistance.

To commence with I first give Order XXX. as it now stands:

ORDER XXX. OF THE RULES OF THE
SUPREME COURT

SUMMONS FOR DIRECTIONS

1. (a) Subject as hereinafter mentioned, in every action a summons for directions shall be taken out by the plaintiff returnable in not less than four days.

(b) Such summons shall be taken out after appearance and before the plaintiff takes any fresh step in the action other than application for an injunction, or for a receiver, or for summary judgment under Order XIV., or to enter judgment in default of defence under Order XXVII., Rule 2.

(c) The summons shall be in the Form No. 3A, Appendix K, with such variations as circumstances may require, and shall be addressed to and served upon all such parties to the action as may be affected thereby.

(d) This Rule shall not apply to Admiralty actions within the meaning of section thirty-four of the Judicature Act, 1873, or to actions coming under the provisions of Order XVIII., or to proceedings commenced by originating summons.

(e) Where, under Order XVIII., the defendant applies for a statement of claim, the Judge may deal with such application as if the plaintiff had been entitled to take out and had taken out a summons for directions.

2. Upon the hearing of the summons the Court or a Judge shall, so far as practicable, make such order as may be just with respect to all the interlocutory proceedings to be taken in the action before the trial, and as to the costs thereof, and more particularly with respect to the following matters:—Pleading, particulars, admissions, discovery, interrogatories, inspection of documents, inspection of real or personal property, commissions, examination of witnesses, place and mode of trial. Such order shall be in the Form No. 4A, Appendix K, with such variations as circumstances may require.

3. No affidavit shall be made or used on the hearing of the said summons except by special order of the Court or a Judge.

4. On the hearing of the summons any party to whom the summons is addressed shall, so far as practicable, apply for any order or directions as to any interlocutory matter or thing in the action which he may desire.

5. Any application subsequently to the original summons for any directions as to any interlocutory matter or thing by any party shall be made under the summons by two clear days' notice to the other party stating the grounds of the application.

6. Any application by any party which might have been made at the hearing of the original summons shall, if granted on any subsequent application, be granted at the costs of the party applying unless the Court or a Judge shall be of opinion that the application could not properly have been made at the hearing of the original summons.

7. On the hearing of the summons, the Court or a Judge may order that evidence of any particular fact, to be specified in the order, shall be given by statement on oath of information and belief, or by production of documents or entries in books, or by copies of documents or entries or otherwise as the Court or Judge may direct.

8. In any action to which Rule 1 of this Order applies, if the plaintiff does not within fourteen days from the entry of the defendant's appearance take out a summons for directions under this Order or for summary judgment under Order XIV., the defendant shall be at liberty to apply for an Order to dismiss the action and upon such application the Judge may either dismiss the action on such terms as may be just or may deal with such application in all respects as if it were a summons for directions under this Order.

I may summarise Order XXX. as follows : A summons for directions must be taken out by the plaintiff generally within fourteen days of appearance, otherwise the defendant may apply to dismiss for want of prosecution, and four days must elapse between the service and return of the summons. Such summons must be taken out after appearance, and before the plaintiff takes any fresh step in the action, subject to this, that without any such summons the plaintiff may apply (1) under Order XIV. ; (2) for an injunction ; (3) for a receiver ; and (4) he may sign judgment for want of a defence. Order XXX. does not, however, apply to Admiralty business, nor, like the other Judicature rules, does it apply to divorce business. The summons is, therefore, generally a compulsory summons, both in the Queen's Bench and in the Chancery Division.

The object of the summons is to enable the Master before whom it comes to at once give general directions as to the course of procedure in the action. He may determine whether or not there shall be pleadings, and he may limit the times for these pleadings irrespective of the Judicature Rules. Subject to any special directions, however, the prescribed times apply. He may at the hearing of the summons, instead of pleadings, order any particulars to be delivered, and points of claim and points of defence, and he may order discovery, and generally once

and for all give directions as to the conduct of the action. But though he may do all this it is not to be supposed that in every case he can at once do so. He may not see his way to it, the parties may not know what they want. In such cases the summons does not die but is still kept alive, and any party requiring anything at a later stage may give notice of an application under the original summons. Thus the idea is the saving of expense and the facilitating the progress of the action generally. This was plainly the idea of the judges in framing Order XXX., but they do not appear to have looked very far into matters, and the result is that all sorts of doubts have arisen, and though Order XXX. may be good in itself, it will need a good deal of remodelling to make it fit in nicely with the general practice. It is necessary to consider the practice as it stood prior to Order XXX. and then see the effect on it of Order XXX. It seems to me then that the best way of studying the subject at present, is to consider matters as they stood untouched by Order XXX., and then to study that Order with the greatest care.

In Part II., Chap. I., of my Practice, the proceedings in the Queen's Bench Division are detailed to appearance—as to the Chancery Procedure, see Part III., Chap. I. I have nothing to say as to the proceedings so far, as they are not altered by Order XXX. Then in Part II., Chap. II., we come to judgment in default of appearance, and applications under Order XIV., and as to the latter subject a few words are necessary. It must be observed that a summons under Order XIV. can be taken out without any summons for directions being issued. Were it not so, half the force and the effect of such a summons would have been taken away. If the plaintiff gets a judgment thus, then, of course, the object of the action is obtained. If the Master gives leave to defend, then he is empowered by Order XIV. to give all such directions as could be given under Order XXX. In other words, the order made may contain those directions which would ordinarily be given on a summons under Order XXX., and if not, a notice for directions may be issued or served. Anyhow, no independent summons for directions is taken out. If no directions are given the defendant must still, as heretofore, deliver his defence within eight days after the Order. This, then, seems fairly plain, and Order XXX. works in very well. If, however, the summons under Order XIV. is dismissed, then there is no power to give directions, but the plaintiff has his chance of signing judgment for want of a defence if he likes to wait for that, or he may at once issue a summons for directions. Anyhow, before the plaintiff can take any fresh step in the action, he must take out his summons for directions. In Stringer's Practice on the summons for directions (p. 111), the matter is plainly put as follows:—"The position of a defendant after dismissal of a summons under Order XIV., would appear to be the same as it was on the day prior to the issue of the summons. His time for defence would be suspended during the whole time the summons under Order XIV. was pending, and would recommence to run on the day after the dismissal of the summons. If, therefore, the action were for a liquidated demand only, and two days of the

time for defence expired before the summons under Order XIV. was issued, the defendant would have to deliver his defence within eight days of the dismissal of the summons. In default of his so doing, the plaintiff would be entitled to enter judgment in default of defence under Order XXVII., Rule 2, and Order XXX., Rule 1 (b)."

Putting aside Order XIV., let us now look at the position of a defendant who has appeared. Firstly, the writ may have been specially indorsed, and here if the defendant does not deliver a defence within ten days from his appearance the plaintiff may sign judgment for want of a defence under Order XXVII., Rule 2, and Order XXX., Rule 1 (b). Secondly, it may be a writ not specially indorsed, but yet for a liquidated amount. If the defendant demands a statement of claim he can rest quietly until the plaintiff takes out his summons for directions, but if he has not demanded a statement of claim, here again at the expiration of the ten days the same result would ensue, viz., that the plaintiff can sign judgment. Thirdly, it may be an action other than for a liquidated demand, and here the defendant need do nothing until the summons for directions has been taken out and an order made thereon. A defence then can be delivered before a summons for directions has been taken out; but it appears that a defendant is not entitled after a summons for directions has been issued to deliver a defence before the summons is heard. If the time for defence expires after the summons for directions has been taken out the plaintiff cannot take advantage of it—the issuing of the summons for directions has suspended his powers. At the hearing of the summons for directions the defendant can of course ask for any extension of time that may be necessary. All this seems very confused, and is matter of construction of Order XXX., whereas it should be all matter specially provided for by the rule itself.

It must be remembered that if a plaintiff does not take out a summons for directions within fourteen days of the appearance of the defendant, the defendant may apply to dismiss the action for want of prosecution, but on any such application, instead of the action being dismissed, directions may be given. This is then practically the defendant's mode of getting directions in the action where the plaintiff does not take the initiative.

Having now got some general idea of the effect of Order XXX. at the very commencement of the action, let us next proceed to notice its effect as the action progresses, and firstly it may be well to observe what is meant by the provision that it is not to apply to actions coming under the provisions of Order XVIII.A. As to this Order, I would refer my readers to my Practice (p. 70), where it will be seen that by adopting a certain procedure the plaintiff may proceed to trial without pleadings, but this is subject to the defendant's right to apply by summons asking that pleadings may be delivered. The result of Order XXX. has certainly been to make proceedings under Order XVIII.A. obsolete, for is it not better for the plaintiff to issue an ordinary writ, then apply for directions and endeavour to get an order dispensing with pleadings and have the action set down at once, rather than to proceed under Order XVIII.A., and have the defendant applying for pleadings,

an application which must resolve itself into the same thing as a summons for directions in an ordinary action? The procedure under Order XVIII^A. was never much used, and I think I may say is now practically obsolete.

In Part II., Ch. IV., of my Practice, various interlocutory proceedings in an action are dealt with, and it is necessary to consider how they are affected by the provisions of Order XXX. All such applications must be more or less necessary as heretofore, but there is a difference in procedure generally, which may be summed up by saying that instead of different summonses being taken out for every particular thing that is desired, they are all obtained under the summons for directions. I have pointed out that on the hearing of the summons the Master's powers take a wide scope. He may give general directions embracing all things. At the summons not only may he direct whether there shall or shall not be pleadings, and the times for them, but he may order discovery, may settle the place and mode of trial, and so forth. Of course he does not do all this spontaneously, but consults the parties and hears their arguments, and may if necessary receive evidence by affidavit, though no affidavit is to be used on the hearing of the summons except by special leave. In a great many cases all this cannot be done at once, but as the action progresses the parties discover their wants. In such cases it must be remembered that the summons for directions is still alive, and everything must be done under that, and no fresh summons taken out. The mode of proceeding is to issue and serve a notice of an application for further directions, which comes before the same Master who dealt with the original summons. This is a two clear days' notice, and it states in what respects further directions are required. It comes on to be heard just as the old summons for the particular thing required came on, and a fresh order is made. Here then is the great difference to be observed throughout in the chapter in my Practice on "Interlocutory Proceedings," and except in that respect the substance of the chapter is correct, subject to particular points with which I will now proceed to deal.

A summons for time to put in a pleading or take any other necessary step is dealt with in my Practice (p. 93), and it is pointed out that it may be served on the day previous to the return thereof. This is the same now when the defendant is applying to keep his time for defence alive before a summons for directions has been issued, but where the summons for directions has been issued we see a difference which surely was never thought of. Any extension of time in such a case must be obtained by a notice under Order XXX., and as all notices under it must be two clear days' notice, the result is that time cannot be obtained as expeditiously as heretofore.

Payment into Court is dealt with in my Practice (pp. 97-102), and that remains as heretofore, but Order XXX. raises a doubt as to the getting of the money out of Court before a summons for directions is issued. It must be remembered that the plaintiff cannot take a fresh step in the action after appearance without first taking out his summons for directions. But how about his taking the money out of

urt? Is not that a fresh step, and can it be done without a summons for directions being first taken out? The conclusion that ears at present to be arrived at is that if the plaintiff accepts the money paid in in satisfaction of his claim, as he terminates the action, may take the money out of Court without applying for directions, that it is otherwise if he desires to take it out without accepting in satisfaction. The act of his taking the money out of Court is ing a fresh step in the action, which he has no right to do until er he has applied for directions. Here then we see an alteration duced by Order XXX. which, no doubt, was never thought of by the mers of it.

An action on contract may in certain cases be transferred to the County Court (see my Practice, p. 113), and this either by the plaintiff the defendant. The defendant can no doubt apply by ordinary summons for such an order before any summons for directions has n taken out, but it is not so as regards the plaintiff. The applica- is clearly a "step in the action," and if the plaintiff wants a asfer to the County Court he must take out his summons for direc- is, and on its return ask the Master to so order. It will then be the Master to make an order transferring the action to the County irt, or if he does not think fit to do so, to make all necessary ections for the continuance of the action in the High Court. This ans some slight delay and further expense, though nothing worth aking of. However, I do not think that what I am stating to be position can hardly yet be considered settled practice. In fact I ow that, at any rate in one of the District Registries, a different w has been taken, and Mr. Stringer, in his work to which I have ady referred, says: "It is not impossible that it may be held in- venient to include within the scope of Order XXX. the making of order which is in no sense a 'direction,' but is in fact a final oval of the action out of the seisin of the High Court."

An order for the arrest of a defendant in the course of an action (see my Practice, p. 115) is not of frequent occurrence, but I ought to ice it as regards the effect of Order XXX. on it. I submit that uly the plaintiff could not make such an application, except by the ns of a summons for directions.

As regards a defendant applying for security for costs (see my etice, 118-121) a defendant can, of course, wait until the plaintiff ies his summons for directions, and apply for security at the hearing it, but he need not wait for this. He can apply by independent amons as heretofore before the plaintiff has issued his summons for ections. The best course is, however, manifestly to wait, for if the amons for directions is taken out the application can then be made, l if it is not the defendant has a simpler course, namely, to apply to miss the action for want of prosecution, by reason of no summons directions having been issued.

Discontinuance (see my Practice, 128) is a convenient mode of a ntiff ending an action. Has Order XXX. affected this? Mr. Stringer his work treats it as an open question, depending upon whether dis-

continuance is a fresh step in the action within the meaning of Order XXX. He says: "If it is, then the plaintiff must clearly issue a summons for directions, and ask for leave to discontinue. If it is not, then he is entitled to serve notice to discontinue without applying for directions." He finally comes to the conclusion—and I think the right one—that if it is a total discontinuance against a sole defendant or all the defendants, then the plaintiff can discontinue without issuing a summons for directions, but that it is otherwise if it is in any sense a partial discontinuance, whether it consists of discontinuance against one or some of several defendants or discontinuance of part only of the claims.

It is necessary to consider the point of how Order XXX. has affected procedure on counterclaims (see my Practice, p. 80). For certain purposes a counterclaim is considered as a separate action, but it in fact is not a separate action, for an action is a proceeding commenced by writ. Still there may be doubts on the subject. If the counterclaim is considered for the purposes of Order XXX. as a separate action then, besides the plaintiff's summons for directions, there must be one by the defendant in respect of his counterclaim. This, however, is not the view that is acted upon at Chambers, for they there for the purposes of Order XXX. consider the counterclaim as an integral part of the action. No difficulty therefore appears to exist here provided that some part of the original action is still remaining, for the plaintiff takes out his summons for directions, and on it the defendant can apply for and obtain any directions he requires in respect of his counterclaim. Suppose, however, that the writ being specially indorsed, the defendant puts in his defence before any summons for directions is taken out, and in that defence he entirely admits the plaintiff's claim and sets up a counterclaim, surely there cannot be any necessity for the plaintiff to take out a summons for directions. Should the defendant then be treated as a plaintiff, and is it his duty to take out such a summons? The point has not as far as I know been decided, and Mr. Stringer, in his work to which I have referred (p. 139), appears to be in great doubt about it. I submit that in such a case the defendant should be considered as the plaintiff, and should take out such a summons. Here, again, we see the doubts produced by Order XXX., which contains haphazard provisions without any apparent consideration of the existing practice.

I have in my remarks so far dealt mainly with practice at the Queen's Bench Division, but more or less the same remarks apply to the Chancery Division. We have there the same general course of procedure, but then it must be remembered that there are certain matters of procedure peculiar to the Chancery Division. In the Chancery Division in the great majority of cases, the plaintiff is not seeking an immediate judgment for money, but he wants accounts and inquiries, *e.g.*, in an administration suit. Supposing the defendant in an action of this kind does not appear, the course of procedure has been for the plaintiff to file a statement of claim, and after waiting 10 days set down the action on motion for judgment (see my Practice, p. 191). It is quite clear

that Order XXX. does not affect the procedure here, which remains as before, for the summons is only taken out after appearance. But there is another case in which the plaintiff can proceed by motion for judgment. Thus suppose in an action of the class to which I have referred, the defendant makes default in putting in a defence after he has entered an appearance. It seems that Order XXX. compels the plaintiff to take out a summons for directions, and that he cannot deliver a statement of claim with a view to quickly getting the action heard, so that here delay is occasioned most unnecessarily. Or again, supposing one defendant appears and another does not, here we must have a summons for directions, and I suppose the proper application to make on it is for leave to deliver a statement of claim against the defendant who has appeared, and file it against the defendant who has not appeared. I do not think there are any other matters peculiar to the Chancery Division which require special attention.

The conclusion to which I have ventured to come, is that Order XXX. is a good idea but not as it stands. It has been rushed, without thought, into the existing system of practice, and has in many respects caused chaos. The officials and practitioners are getting to understand it, and to know where it is good and where it is bad or even absurd. As soon as the practice has a little settled down, and the doubts and difficulties are fully appreciated, it appears to me that there will be a good opportunity for a reconsideration of the whole of the rules of court, and it is to be hoped that this will be done. In the meantime, it is necessary for practitioners and students to understand the matters as they stood, before Order XXX. came into operation, and then to consider its provisions and how they affect the previously existing practice. I trust that this Supplement may assist some of my readers in arriving at this much to be desired result. It forms in substance a reprint of an article which I published in this month's issue of the *Law Students' Journal*.

JOHN INDERMAUR.

22 CHANCERY LANE, *March 1899.*

